Decision of Rosling, J., Dated April 27, 1965

ROSLING, J.

Upon petition by New York World's Fair 1964-1965 Corporation (hereinafter "Fair Corporation" or "FC") to review Order of Referee in Bankruptcy granting cross-motion of trustee in bankruptcy (trustee) of Amphitheatre Incorporated (Amphitheatre), a bankrupt, for summary judgment on the Fifth, Sixth, and Seventh Counterclaims in trustee's answer, order of Referee is reversed, summary judgment vacated, and the trustee's motion is denied. The factual issues tendered by the counterclaims and by FC's reply thereto require a plenary trial by the Referee, and are, accordingly, remanded to him for such trial in conformity with the legal principles noted herein as applicable.

The order certified for review by the Referee was made on 2/8/65 in the context of the following circumstances and proceedings:

FC as landlord moved by petition for an order directing the trustee to vacate premises which FC had leased to Amphitheatre for use by the tenant in the production of an entertainment-spectacular at the New York City World's Fair (fair) during the 1964 and 1965 seasons.

In his answer to FC's application the trustee in Amphitheatre's right counterclaimed for the recovery of $250,000 alleged by the trustee to have been deposited by Amphitheatre as lessee with FC as security under the lease between the parties. FC in its reply, supplemented by affidavits and exhibits, denied that security as the trustee characterized and described it had been deposited. FC maintained to the contrary that the sum in question had been advanced bona fide to FC by Amphitheatre pursuant

to a general subscription agreement to which many fair exhibitors, including Amphitheatre, as well as other non-exhibitors, were joint parties; that the purposes of such subscription were clearly stated in writings, and that some $30,000,000 had been raised through such subscriptions and expended in implementation of the objectives declared in such writings and without which expenditure the fair could not have come into being and the intent and function of the subject lease would have been frustrated.

Details of the relevant papers and proceedings appear infra pp. 7 et seq.

The Referee, in findings of fact and conclusions of law [1] held that the Corporation "had commingled the security deposit of $250,000 contrary to Section 233 of the New York Real Property Law, now Section 7-103 of the New York Obligations Law," [2] and granted summary judgment as noted above. The order entered thereon, and here set aside, directed that "the Fair Corporation pay forthwith to the trustee the sum of $250,000 together with interest at six per cent per annum on the sum of $250,000 from February 1, 1964."

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[1] Fed. R. Civ. P. 56 (Summary judgment), is held to apply to bankruptcy proceedings. (See 6 Moore's Federal Practice [2d Ed.] ¶56.17[7] pp. 2182, et seq.) Fed. R. Civ. P. 52(a) is explicit in its declaration that "[f]indings of fact and conclusions of law are unnecessary on decision of motions under Rules * * * 56 * * *." On the other hand General Order 47 in Bankruptcy provides that "[u]nless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous."

[2] For quotation of the provisions and discussion as to their relevance and effect, see infra pp. 8, et seq.; pp. 26, et seq.; fn. 12, pp. 34, 35.

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As a preliminary to consideration of the documentation upon which the Referee bottomed his determination, reference is here made to the limitations established by decisional law upon the granting of motions for summary judgment.

Basic is the principal that "summary judgments are not appropriate 'where motive and intent play leading roles.'"[3] In this connection it is to be noted that the parties stipulated as to the documents which the Referee might consider in determining the motion for summary judgment.[4] These documents evince a sharp disagreement between the parties as to the central factual element, namely, whether the preliminary negotiations for the lease were sincere and genuine in their creation of a documented loan relationship between the parties or were a mere pretense designed to dress up a security transaction so that it would be masked as a loan from tenant to landlord whereby the monies to the lessor's behoof might be freed of the non-waivable trust restrictions imposed by law and be used without exposing the user to criminal sanctions.[5]

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[3] Opinion in White Motor v. United States, 372 U. S. 253, 259, 83 Sup. Ct. 696, 700, quoting with approval from Poller v. Columbia Broadcasting System, 368 U. S. 464, 82 Sup. Ct. 486 (1962). See also Cross v. United States, 336 F. 2d 431 (2d Cir. 1964), citing Empire Electronics Co. v. United States, 311 F. 2d 175, 180 (2d Cir. 1962); Alabama Great So. R.R. v. Louisville & Nashville R. Co., 224 F. 2d 1, 5 (5th Cir. 1955); Subin v. Goldsmith, 224 F. 2d 753, 758 (2d Cir. 1955).

[4] See supra pp. 7, 18.

[5] Diversion by the landlord of security deposited under a lease is denounced as a misdemeanor under New York State Penal Law §1302-a, and possibly, and more seriously, under §§1290 and 1302.

This circuit, citing decisions in others, has warned in situations analogous to the instant controversy "that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the *slightest doubt* as to the facts." (emphasis supplied) [6] But even if the evidentiary facts were wholly stipulated and the parties in agreement except as to the inferences of fact to be drawn from the facts, and joining in reciprocal motions for summary judgment, those motions must be denied if alternative inferences were reasonably deductible. "The facts and circumstances, although in no material dispute as to their actuality, reveal aspects from which inconsistent hypotheses might reasonably be drawn and as to which the minds of reasonable men might differ." So reads the opinion in Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co.[7] which continues: "The drawing of inferences and the acceptance of hypotheses arising out of the facts are ordinarily attributes that the judicial process has conferred upon the finder of the facts."

And of similar purport is the comment in Bragen v. Hudson County News Co.[8] as follows:

> "The impact of particular circumstances upon an inference arising from an admittedly existing fac-

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[6] Doehler Metal Furniture Co. v. United States, 149 F. 2d 130 (2d Cir. 1945). See also to like effect Reliable Machine Works v. Furtex Machine Corp., 11 F. R. D. 525 (S. D. N. Y. 1951); Drake v. Handman, 30 F. R. D. 394 (S. D. N. Y. 1962); Peckham v. Ronrico Corp., 171 F. 2d 653 (1st Cir. 1948).

[7] 81 F. 2d 341 (5th Cir. 1950) quoted with approval in Empire Electronics Co. v. United States (2d Cir. supra).

[8] 278 F. 2d 615, 618 (3d Cir. 1960), likewise quoted and approved in Empire Electronics, supra fn. 7. See also, to like effect.

> tual situation calls for a factual determination which is the function of the trier of the facts and not that of the court in disposing of a motion for summary judgment. See Gray Tool Co. v. Humble Oil & Refining Co., 5 Cir. 1951, 186 F. 2d 365, 367, certiorari denied 341 U. S. 934, 71 S. Ct. 854, 95 L. Ed. 1363, where it was held that 'A judge may not, on a motion for summary judgment, draw fact inferences. * * * Such inferences may be drawn only on a trial.' "

It is not "the function of the [trier of the facts], on a motion for summary judgment * * * to undertake where * * * conflicting inferences may be drawn, to determine what they should be."[9]

A related rule of adjective law compels such holding. Both rules are noted and their synthesis articulated in United States v. Diebold, Incorporated, 369 U. S. 654, 82 Sup. Ct. 993 in the following language:

> "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of *International Shoe Co.* v. *Federal Trade Comm'n*, it was improper for the District Court to decide the ap-

[9] Paul E. Hawkinson Co. v. Dennis, 166 F. 2d 61 (5th Cir. 1948).

plicability of the rule on a motion for summary judgment. Fed. Rules Civ. Proc., 56 (c)."

Papers and Exhibits Before the Referee on the Motion for Summary Judgment

The relief sought by motion of FC returnable 2/5/65, namely surrender by the trustee of Amphitheatre of the leased premises and the review of the order of the Referee awarding such possession to the lessor are mooted by the stipulation of the parties that the trustee withdraws his petition for such review.

The petition verified, 12/29/64, and exhibits thereunto annexed, submitted by FC in support of such motion, continue, however, to constitute by further stipulation of the parties dated 2/2/65, part of the documentation upon which the Amphitheatre's crossmotion for summary judgment was to be decided by the Referee. A second such document thus stipulated for consideration was Amphitheatre's "Answer, set-offs and Counterclaims", dated 1/4/65.

The allegations of FC's petition as admitted or placed in issue by the answer may be summarized as follows:[10]

By lease, copy annexed, FC leased to Amphitheatre 5/5/61 premises known as "New York State Amphitheatre and Exhibit Building" for the term commencing 1/1/62 and expiring, unless sooner terminated, on the final day of the New York World's Fair in 1965.

On 6/29/64 Amphitheatre filed a petition for an arrangement under Chapter XI of the Bankruptcy Act and on 12/15/64 the tenant by its consent was adjudicated a bank-

[10] Allegations and relevant exhibits summarized are admitted by Amphitheatre unless noted otherwise. Allegations not pertinent to what is here sub jud. are omitted.

rupt. Petition alleges, but trustee denies that the debtor discontinued its operations in the leased premises on or about 7/29/64.

The Amphitheatre answer, a lengthy document, sets out thirteen defenses, some of which are additionally denominated set-offs and counterclaims. Directly involved and adjudicated in the order here reviewed were, however, only the Fifth, Sixth and Seventh Counterclaims analyzed below:

Fifth Counterclaim

Under paragraph 41st of the lease [11] Amphitheatre was

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[11] Paragraph 41st of the lease provision reads as follows:

"Within sixty days after the execution of this lease by the Producer and delivery thereof to the Fair Corporation, the Producer shall deposit with the Fair Corporation (and shall keep deposited throughout the Term) $250,000 principal amount of the Fair Corporation's 6% Promissory Notes, purchased from the Fair Corporation by the Producer, as security for the full, faithful and prompt performance of, and compliance with, on the part of the Producer of all of the terms, convenants, agreements and conditions of this lease on its part to be performed, kept and observed. So long as the Producer is not in default under this lease, the Producer shall be entitled to receive the interest paid on such Notes. In addition to any and all other remedies available to it under this lease or otherwise, the Fair Corporation shall have the right, at its option, at any time and from time to time, to use the security or any part thereof in whole or partial satisfaction of any of its claims or demands against the Producer. There shall be no obligation on the Fair Corporation to exercise such right and neither the existence of such right nor the holding of the security itself shall cure any default or breach on the part of the Producer. In the event that the Fair Corporation shall at any time or times

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required to deposit with FC "security for the full, faithful and prompt performance on the part of Amphitheatre of the terms of said lease, a sum of $250,000."

In compliance with said paragraph 41st, a check in the sum of $100,000 was delivered to FC 7/17/61 and a further check in the sum of $150,000 on 8/15/61, both of which were deposited to the credit of FC.

Pursuant to Section 233 of the New York Real Property Law then in effect (now General Obligations Law, Section 7-103) [12] the $250,000 deposited with accruing interest con-

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so use the security or a part thereof, the Producer shall, on demand of the Fair Corporation and within two (2) days thereafter, deposit with the Fair Corporation additional Fair Corporation 6% Promissory Notes or cash so as to maintain the deposit at all times to the full amount of $250,000; all such additional security shall be subject to all the conditions of this Article. After the end of the Term and upon condition that the Producer shall then be nowise in default under any part of this lease and shall have restored the Premises as required herein, and upon written request therefor by the Producer, the Fair Corporation will return the security to the Producer, less the amount of any and all unpaid claims and damages of the Fair Corporation by reason of any breach or default by the Producer under this lease or any part thereof. The Producer agrees that it will not assign or encumber said security."

[12] New York Real Property Law, §233 reads as follows:

"Whenever money shall be deposited or advanced on a contract for the use or rental of real property as security for performance of the contract or to be applied to payments upon such contract when due, such money, with interest accruing thereon, if any, until repaid or so applied, shall con-

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tinue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same, but may be disposed of as provided in section thirteen hundred and two-a of the penal law. Any provision of such a contract whereby a person who so deposits or advances money waives any provision of this section is absolutely void. Added L. 1935, c. 581; amended L. 1942, c. 628; L. 1943, c. 584, eff. April 17, 1943."

General Obligations Law, §7-103:

"1. Whenever money shall be deposited or advanced on a contract or license agreement for the use or rental of real property as security for performance of the contract or agreement or to be applied to payments upon such contract or agreement when due, such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same, but may be disposed of as provided in section thirteen hundred two-a of the penal law.

"2. Whenever the person receiving money so deposited or advanced shall deposit such money in a banking organization, such person shall thereupon notify in writing each of the persons making such security deposit or advance, giving the name and address of the banking organization in which the deposit of security money is made, and the amount of such deposit.

"3. Any provision of such a contract or agreement whereby a person who so deposits or advances money waives any provision of this section is absolutely void.

"4. The term 'real property' as used in this section is coextensive in meaning with lands, tenements and hereditaments."

tinued to be Amphitheatre's money and was required to be held in trust by FC and not to be mingled with the personal moneys or become an asset of FC. Contrary, however, to the statutory provision cited FC commingled said sum with its personal moneys, thereby unlawfully converting it to its own use.

Sixth Counterclaim

In the Sixth Counterclaim it is additionally alleged that FC as a condition to the making of the lease required Amphitheatre to execute and deliver to the Chase Manhattan Bank (Chase) as Agent for FC a subscription agreement under which Amphitheatre subscribed for $250,000 of FC's 6% promissory notes; that "in furtherance of such condition precedent Fair Corporation caused to be transmitted to [Chase] the two checks referred to [in the Fifth Counterclaim] totalling $250,000, and thereafter 6% promissory notes of the Fair Corporation in the principal amount of $250,000 were issued to Amphitheatre, Inc., but never delivered to it, and were held for and on behalf of [FC] as the security required under said lease."

"[T]he foregoing was a device intended to be subterfuge to circumvent the provisions of the Statute relating to the deposit of the said security, in violation of the non-waiver provision contained in said statute."

Seventh Counterclaim

Realleging, preliminarily, the substance of the Fifth Counterclaim, the Seventh then declares that upon receipt of the $250,000 from Amphitheatre "Fair Corporation became a Trustee of said moneys, and was under a duty and obligation to treat said deposit of money as a trust fund" (but) "that in violation of its duty and obligation

as such Trustee, Fair Corporation caused the said sum of $250,000 to be paid to its Agent in exchange for its own promissory notes".

In so doing "the Fair Corporation attempted to change and alter the trust relationship between (FC) and Amphitheatre into a debtor and creditor relationship," (but) "even if Amphitheatre consented to the foregoing, it was and is absolutely void under the provisions of the New York Real Property Law and the General Obligations Law, which prohibit the waiver of any of the provisions thereof".

Each of the three counterclaims condensed in the foregoing concludes with the claim that the trustee was thereby entitled to the immediate repayment by FC of the $250,000 with interest.

The reply [13] of the FC to the counterclaims denied all that was alleged therein except (as to the Fifth Counterclaim) that the checks dated 7/17/61 ($100,000) and 8/15/61 ($150,000) were delivered to FC and deposited to its credit, said checks having been received by it for its notes pursuant to a subscription agreement executed by Amphitheatre; and, except (as to the Sixth) that FC caused to be transmitted to Chase the two checks just mentioned, for which $250,000 of 6% promissory notes of the FC were issued to Amphitheatre and that the notes were thereafter held in a safekeeping account as the security required under the lease.

FC's reply denies all that is alleged in the Seventh Counterclaim.

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[13] The reply dated 1/22/65 was also by the stipulation made part of the record before the Referee.

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Before the Referee also by virtue of the stipulation was the motion made by FC dated 1/6/65 and the supporting affidavit of Ambrose Doskow, one of FC's attorneys, sworn to the same date together with exhibits annexed to the affidavit. The relief sought by such motion does not here concern us,[14] nor does the content of the supporting and opposing papers [15] which address themselves almost wholly to the questions touching Amphitheatre's precarious financial condition and the desire on FC's part to gain possession at the earliest moment so as to be able to negotiate with other prospective tenants a lease of the premises for the imminent opening of the second and final season (1965) of the fair.

Responding to the allegations of Amphitheatre in its answer and opposing papers FC submitted the answering affidavit of Witt, its Comptroller, sworn to 2/1/65. To it were attached as exhibits documents bearing directly upon the matters here reviewed. The stipulation brings these papers likewise into the ambit of the documentation considered by the Referee upon Amphitheatre's motion for summary judgment on the three counterclaims.

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[14] The motion appears to have been a renewal of the pending motion for possession of the premises. Joined with such prayer was an application severing for later determination all other issues including those raised by the Fifth, Sixth and Seventh Counterclaims for the recovery by Amphitheatre of the $250,000 "security" deposit. Apparently the Referee had withheld acting upon such prior motion (by which FC sought possession) so that the contesting parties might explore the possibility of negotiating to a resolution of their differences.

[15] These, also included in the papers submitted to the Referee by the stipulation, consist of the affidavits of Adelman, one of Amphitheatre's attorneys, and Rudel, the company's treasurer, both sworn to January 8, 1965.

Witt's affidavit disputes the trustee's charge that Article 41st of the lease requiring the deposit of FC's 6% notes "was a device designed to circumvent the New York statute" (supra, p. 9). The statute was neither mentioned, nor considered, the only alternative proposed being the posting of a surety company performance bond. Such proposal was at the instance of Amphitheatre which had objected to the bond requirement.

Witt cites in support of his statement a checklist which formed the agenda for a meeting held 3/13/61 of attorneys and parties prior to the preparation of the lease; also, a minute of the discussions had on that occasion.

On March 30th following, the Executive Committee of the FC considered the proposed lease. The minutes of that meeting contained the memorandum that "[t]he Lessee proposes to purchase $250,000 of the Fair Notes and to deposit them as security in lieu of a performance bond," and a further note that the Committee after such discussion had authorized the president of the corporation to negotiate the lease "substantially on the basis outlined above".

As executed on 5/5/61 the lease provided in its 41st Article for the deposit of $250,000 in notes within sixty days thereafter. Witt in implemenation of the provision, on June 15th sent the president of Amphitheatre a Subscription Agreement and Subscription forms together with a copy of the Official Statement which publicized the note issue. Copies of this material were annexed to the Witt affidavit. Amphitheatre executed the Subscription blank on June 21, 1961. It contained an acknowledgement by the subscriber "that this subscription is made under and pursuant to and in all respects subject to the

terms, conditions and provisions contained in the above-mentioned Subscription Agreement, as amended, to which the undersigned hereby becomes and is a party."

The Subscription Agreement is too lengthy and detailed for convenient summarization. Several paragraphs for their pertinency to the controversy are, however, quoted in extenso.

In Section 1(a) the FC represents and warrants that it "has been duly organized as a membership corporation under the laws of the State of New York, is a valid and subsisting corporation pursuant to such laws, and has good right and lawful authority to finance, construct and operate the 1964-1965 New York World's Fair as described in the Corporation's Official Statement dated April 10, 1961 (hereinafter called the 'Official Statement'), a copy of which will be furnished to each Subscriber by the Corporation." [16]

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[16] The statement is a brochure consisting of twenty-five large and closely printed pages. The cover is headed

"$40,000,000
New York World's Fair 1964-1965 Corporation
6% Promissory Notes
Due August 1, 1966
Price 100%"

and contains inter alia the explanation that the issue had "not been registered under the Federal Securities Act of 1933 as amended since in the opinion of bond counsel to the Corporation the Notes are exempt from such registration within the provisions of Sections 3(a)(4) of said Act."

The nature and scope of the contents of the Statement may be judged from the index which lists the following items:

"Description of Promissory Notes

(footnote continued on next page)

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Application of Revenues
Issuance of Additional Notes
Method of Payment of Subscriptions
The Corporation
The World's Fair
Site
Construction
Transportation Facilities
Restoration
Estimated Costs, Revenues and Financing Requirements for the World's Fair
Estimated Receipts, Costs and Surplus
Legal Proceedings
Board of Directors
Report of Andrews & Clark, Construction Engineers for the Corporation
Location Map
Area Map
Report of Madigan-Hyland, Revenue Engineers for the Corporation".

Excerpts, set out below, from the Statement specify some of the uses to which the enormous sums which it was hoped to raise by the Note issue were to be put. Manifestly, only through the expenditure of the money raised for the projected construction and maintenance of facilities would the individual lessees have the benefit of their bargains. The project was a joint effort in which the participants were governments (national, state, municipal and foreign), the business universe, represented by the giants of industry here and abroad, the entertainment world, and John Q. Citizen and his brothers, who, hopefully, would attend in numbers estimated on a daily basis as ranging from 250,000 to 500,000.

The excerpts follow:

"Construction

The Corporation's construction program includes grading, paving, fencing, landscaping and lighting; construction of

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certain temporary structures, such as an administration building, police, fire, and maintenance facilities, bus terminal and stations, toll entrances, and pedestrian overpasses and bridges; construction of parking fields; and construction, improvement and replacement of certain necessary drainage, water, sewer, gas, electric and communication utilities. As above stated, the City of New York is planning to undertake certain improvements to Flushing Meadow Park, including the construction of sewers, roadways and certain utilities.

The Corporation will make use of certain of the utilities which were installed at Flushing Meadow Park for the 1939-40 World's Fair. The existing facilities include approximately 10 miles of sanitary sewers, 20 miles of storm sewers, 15 miles of water mains, 13 miles of gas mains, electric conduits for light, power and communication and sewage pumping stations. In the opinion of the Construction Engineers, a substantial percentage of the existing underground facilities are in usable condition. The extent of repairs, replacements and additions to subsurface utilities will depend upon the development plan of the Fair and the location of the buildings and, except for temporary work, will be subject to the approval of the City Commissioner of Parks. Under the lease, the City will supply water to the Fair site without charge to the Corporation for this or for sewer rental. The Corporation is required by law to prepare and has prepared a special code of laws dealing with health, sanitation and building, which has been enacted by the City Council as and for a special code of laws governing the area leased to the Corporation.

The Corporation proposes to construct necessary parking lots in connection with the World's Fair. It is expected that the transportation of visitors from the parking fields to the gates will be provided by the Corporation at a nominal charge.

The Corporation will not be responsible for the construction of pavilions and buildings of exhibitors or restaurants and other concessions. The design and construction of these

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structures will be undertaken by the exhibitors and concessionairs, subject to the approval of the Fair Management. Such structures will be temporary and will be demolished by exhibitors and concessionaires at their expense when the Fair site reverts to the City as a Park and recreation area upon the termination of the Fair.

Our City, State and Federal governments, as well as domestic industries and foreign governments, will participate actively in the Fair. The present City Building on the Fair grounds is available to the City, and State participation has been authorized by an act of the Legislature. The Secretary of Commerce has been designated by the President to make plans for Federal participation, and appropriate enabling legislation authorizing Federal participation is expected to be enacted by the Congress.

The Corporation is required by law to provide and pay for police and fire department forces adequate for the protection of the Fair grounds. The Corporation expects to contract for these services, as well as for refuse collection, landscaping and upkeep of the grounds. The Corporation is also required to carry at its own expense fire insurance on all permanent structures and general public liability insurance in limits of $250,000/$1,000,000 for personal injury or death and $50,000 for property damage. Under the lease, the Corporation is to pay all costs for the care, maintenance and protection of the leased property and of all buildings, roads, paths, planting, sanitation, drainage, light, power and other utility systems and other work thereon.

Transportation Facilities

One of the important factors that influenced the selection of the Flushing Meadow Park site for the 1964-1965 World's Fair is its accessibility and its geographical location in the City of New York. It is reached easily by motor, rail, water and air from any part of the metropolitan area where by

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1964-1965, as indicated in the appended report of the Revenue Engineers, over 17,000,000 people are expected to live and work.

Flushing Meadow Park will be served by an arterial system of parkways, expressways and other highways which, in the opinion of the Construction Engineers, at the completion of the planned widenings and extensions of existing highways, will be capable of handling effectively all traffic expected in this area in the foreseeable future, including the anticipated Fair traffic in 1964 and 1965.

In addition, the Fair site is served by the three lines of the City's rapid transit system,—namely, the IRT Flushing Line running along Roosevelt Avenue, the Queens Line of the Independent System running along Queens Boulevard, and the Forest Hills Line of the BMT running on the Independent tracks along Queens Boulevard as far as 71st Avenue. In 1939-40 the World's Fair site was served by the Long Island Rail Road by a station built on its Port Washington Branch, and similar service will be furnished for the 1964-65 Fair. There are also numerous existing bus lines from which connections to the Fair site can be made. Water access to the Fair site is available, and additional facilities are under study.

Restoration

Under the law and the Corporation's lease with the City, the Corporation has the responsibility, at its own expense but under the supervision of the City Department of Parks, to restore the Fair site to a City park and recreation area upon the termination of the Fair. Demolition of buildings and temporary structures, including pavements, not removed by the exhibitors and concessionaires will be at the expense of the Corporation. The demolition of the temporary structures will be carried out in accordance with specifications to be furnished by the Department of Parks."

In Subdivision (e) of the same section the corporation further warrants that it will "use the proceeds of the Promissory Notes issued pursuant to this Agreement only for the payment of (i) $2,000,000 principal amount of outstanding 5½% promissory notes maturing on various dates in December, 1960, any extensions or renewals thereof, and additional bank loans or other borrowings estimated not to exceed $2,000,000; (ii) pre-Fair organization costs and expenses, and (iii) the Corporation's cost of construction of the 1964-1965 New York World's Fair."

Section 2, under a headnote "Subscriptions" provides that "[e]ach of the Subscribers severally agrees, on the terms of this Agreement, to lend to the Corporation, and the Corporation agrees to borrow from each of the Subscribers, at the office of the Agent designated as provided in Section 3, the sum, to be evidenced by Promissory Notes of the Corporation, specified in the subscription executed by such Subscriber and delivered to the Agent. The aggregate principal amount of such Notes shall not exceed $40,000,000 except as provided in Section 8. The offer of each Subscriber to lend funds to the Corporation shall be contained in a subscription addressed to the Corporation and executed by such Subscriber, substantially in the form annexed hereto as Exhibit 'A', and delivered to the Agent at its principal office. Upon such execution and delivery of said subscription, the Subscriber named therein shall thereby be and be deemed to be a party to this Agreement with the same force and effect as though such Subscriber were an original signatory hereof."

Section 7, headed "Equality Among Subscribers" declares that "[e]ach payment and prepayment to the holders of the Notes shall be made pro rata according to the respec-

tive amounts of the Notes held by them at the time of such payment or prepayment."

Section 13(1) stipulates in part that "[e]ach subscription shall become effective at the time when subscriptions for $25,000,000 principal amounts of Notes shall have been executed and delivered to the Corporation."

The $25,000,000 subscription minimum was achieved, according to Witt, on or about 7/14/61, and the overall total subscribed, with all subscribers binding themselves under the same Subscription Agreement, amounted to about $30,000,000.

At the request of Amphitheatre, the Witt affidavit continues, payment for its notes was deferred. The extension was embodied in a supplemental letter agreement entered into by FC with Amphitheatre 7/10/61 which modified Article 41st of the lease. By its terms a check for $100,000 was immediately delivered to FC, a fact the letter acknowledged. Upon its receipt it was forwarded by Witt to Chase as Agent under the Subscription agreement. Amphitheatre, as part of the deferral, gave its note to FC for the balance of $150,000, due with interest on 9/15/61. The note was, however, prepaid on 8/15 by Amphitheatre, which transmitted it to FC with a letter reading:

> "Attached please find our check for $150,000.00 which completes our commitment to you to purchase $250,000.00 of your bonds.
>
> "It is our understanding that you will hold these in lieu of a performance bond until the termination of the Fair."

Upon receiving the $150,000 check Witt immediately forwarded it to Chase to be applied by it in payment of the

balance of the $250,000 subscription note. The Chase, as Agent, issued two subscription notes payable to Amphitheatre evidencing these payments, one being dated 7/21/61 for $100,000 and the other August 17, 1961 for $150,000.

On 11/3/61 Witt mailed the notes, held by it as security under the 5/5/61 lease with Amphitheatre, to Chase with instructions in the accompanying letter that the notes should be presented to FC for the semi-annual interest due thereon, and that the interest when paid should be forwarded to Amphitheatre. Chase was in the same letter directed to place the $250,000 subscription notes in FC's safekeeping account at Chase and to issue a receipt to FC accordingly.

On 8/1/64 FC prepaid 25% of principal to all note holders. Two days earlier (7/30/64) Witt had written to Chase confirming oral instructions earlier given that Chase was to transmit the "redemption payment" ($62,500, one-fourth of the $250,000 principal of the notes) "for deposit in New York World's Fair 1964-1965 Corporation Security Account Number One."

Interest payable 8/1/64 on the notes was to be transmitted to Security Account Number Two. Witt avers that since 8/5/64 there has been continuously on deposit in the security accounts at Chase the $62,500 principal prepayment and $7,500 interest on the notes. On the date of such deposit Amphitheatre was in possession of the demised premises as debtor under the then pending Chapter XI proceedings.

This concludes the summary of the pertinent allegations of the Witt affidavit.

The last of the documents before the Referee pursuant to the stipulation is a lengthy affidavit of Adelman, co-

attorney for the trustee, sworn to 2/1/65, to which were annexed two exhibits.

Before passing to an analysis of the Adelman affidavit upon the basis of which the "cross-motion" of Amphitheatre for summary judgment on the Fifth, Sixth and Seventh Counterclaims was awarded by the Referee, some note should be taken of the context in which in the absence of a formal cross-motion the Referee entertained such motion and granted it. The Referee's Certificate of Review supplies the circumstances. In it, after a brief preliminary statement of the situation, the Referee notes that on 1/7/65 the FC had filed its motion for an order giving it possession and severing the remaining issues for later separate determination. On the following day, upon the return of the motion, the trustee filed his opposing (Adelman) affidavit and "orally moved for summary judgment under (Amphitheatre's) fifth, sixth and seventh affirmative defenses and set-offs and counterclaims, among others. Both parties requested an immediate determination of their respective rights * * *." Thereupon, after conference between the attorneys they both "submitted their stipulation of facts dated February 2, 1965, filed on February 8, 1965, and each party submitted proposed findings of fact and conclusions of law based on such stipulation. This Referee then adopted certain of the findings of fact and conclusions of law submitted by each party and rejected others * * *.[17]

[17] The Adelman opposing affidavit of 2/1/65 made the point that in the state of the record the Referee was authorized upon FC's motion to grant summary judgment in favor of Amphitheatre even though no formal cross-motion has been made by it for such relief. Purely as a procedural proposition Amphitheatre's contention is cor-

(footnote continued on next page)

The Adelman affidavit to which we now revert cavils at Witt's assertion that "in the negotiations regarding the security provision of the lease there was no mention of consideration of the statute." Adelman implies disbelief. "Assuming that is true that the parties did not discuss this section [of the statute] or agreed to deliberately circumvent it, it does not affect the ultimate outcome which resulted in a violation of the statute."

In support of his charge that FC must have contemplated this violation he points to the circumstance that Witt as its Comptroller must have been aware of the provision for "Application of Revenues" in the Official Statement (page 2) and the parallel in clause § 9(b) of the Subscription Agreement reading as follows:

> "(b) All revenues, rates, fees, charges, rents (*other than rental deposits or payments reserved for a special purpose under the terms of a lease*) and other income and receipts derived by or for the account of the Corporation from the operation of the 1964-1965 New York World's Fair from and after the Closing Date, including the investments, if any, thereof and the proceeds of the Notes will be applied to the payment of the principal of and interest on the Notes in accordance with their terms and the

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rect. International Longshoremen's Association v. Seatrain Lines, Inc., 326 F. 2d 916 (2d Cir. 1964); International Hod Carriers v. Mason Tenders, etc., 291 F. 2d 496 (2d Cir. 1961); Wittstein v. American Federation of Musicians, 223 F. Supp. 27 (S. D. N. Y. 1963); Roberts v. Fuquay-Varina Tobacco Board of Trade, 223 F. Supp. 212 (E. D. N. C. 1963). See, generally, 6 Moore, op. cit. ¶56.12, p. 2088.

provisions of this Agreement, subject only to the application thereof to the costs and expenses of the Corporation in connection with construction, operation and maintenance of the 1964-1965 New York World's Fair, including necessary reserves therefor." (Emphasis supplied by affiant Adelman)

"Clearly", Adelman comments with respect to the foregoing, "Mr. Witt knew that there was a distinction between all moneys received by the Fair Corporation out of its operations and money received as rental deposits under the terms of a lease."

Citing Witt's statement that in lieu of the performance bond it had demanded, the FC was "willing to accept $750,000 worth of Fair Corporation's notes as security under the lease" etc., Adelman would have the Referee draw the inference thereform that this constituted "a clear admission that the first acceptance of Fair Corporation's notes as security under the lease emanated from Mr. Witt." This, in Adelman's view, if we read him aright, is a circumstance undercutting FC's contention that it was not attempting by a legal double-entendre to evade the effect of the New York State security statute. That what Adelman denotes is a possible inference does not exclude as an alternative a holding that FC's motivation was exactly in conformity with what FC said it was.

In similar fashion the trustee argues with respect to Witt's reference to the letter agreement of 7/10/61 in modification of the lease. "Clearly", Adelman contends, "the Fair Corporation was [thereby] seeking to obtain $250,000 from the Bankrupt as soon as possible to use it for its general purposes and not to hold it as they were obligated under the law in trust for the Bankrupt." The

inference, however, which Adelman would have the Referee draw therefrom is not as matter of law the only one deducible from the factual context. Were it not for the joint subscription of exhibitors, as well as others, to the note issue the FC would, surely, have lacked the funds with which to build and operate the fantastic World's Fair by which alone Amphitheatre's lease could be something more than a lease of vacant land. The promise of a concourse of humanity that Amphitheatre hoped for as the reservoir from which it might draw its own profitable clientele would, without the expenditure of the proceeds of the subscription notes, have been no more than empty words. These observations, so obviously true in their mere utterance, apply with equal force to much more that the Adelman affidavit has to say in its effort to establish that the Note Subscription, in Amphitheatre's special case, must be understood only and inevitably as constituting a payment to FC as landlord of cash security which FC has failed to maintain in a special earmarked account. Excluded thereby would be the alternative inference, equally reasonable, that the note subscription, affecting large numbers of exhibitors and so multifarious in its ramifications, was a loan by many for a vast community project. Subscription was required by FC of Amphitheatre as a condition of its being accepted as a tenant, but the posting of the notes by Amphitheatre as security did not necessarily have the effect of stripping from these instruments every aspect of their origin and function, all their interdependent complex relationships, and FC's commitments for the benefit of all. The provisions of the carefully drawn legal documents upon the basis of which more than $30,000,000 was invested in the note issue alone, may not be discriminatorily disregarded at the instance of a single lessee and to the prejudice of all the other subscribers.

The following illustrates how the Adelman affidavit in an effort to sustain as the only conclusion permissible, the inference his client sponsors lifts a sentence from its textual environment to distort its true meaning, and thereby admonishes that only through plenary trial can one confront the broad panorama of evidentiary detail, here to be found, with some assurance of avoiding inadvertent error. Quoting out of context, the Adelman affidavit challenges Witt's construction of the letter of 8/16/61 in which Witt had acknowledged to Amphitheatre receipt of its $150,000 check and $1,125 interest as advance payment of the Amphitheatre note "under the terms of the Amendment to Article 41st" of the lease. With somewhat less than complete ingenuousness Adelman then purports to excerpt a sentence from the letter and to comment thereon. The Adelman affidavit in this connection reads:

"Mr. Witt, however, conveniently overlooks the letter" wherein he "states 'You have now paid the full $250,000 required as security under the lease.' " The Adelman gloss is that such sentence "clearly spells out the Trustee's contention that not only was the security deposit made in cash, but also that the Fair Corporation charged and collected from the Bankrupt interest on part of this security deposit because of its delinquent payment thereof."

On neither score, however, is the fuller text of the letter susceptible of only the single inference which Adelman argues must be drawn. The complete paragraph, comprised of two sentences of which Adelman has quoted only the first reads, with emphasis supplied by the Court, as follows:

> "You have now paid the full $250,000 required as security under the lease. I am *forwarding your check to the Chase Manhattan Bank, as Agent, to issue the*

Fair Corporation 6% Promissory Notes due August 1, 1966, *which will be held by us as security* under the Amphitheatre lease."

It thus appears, not only as an alternative, but emphatically the more likely inference to be drawn, that the "cash" Amphitheatre deposited was by its express agreement turned over to the Chase as Agent not for Amphitheatre alone, but for all those who participated in the $30,000,000 note subscriptions.[18] The 8/16/61 letter, if fairly and completely read, clearly declared that not cash, but Subscription Notes, as stipulated in paragraph 41st of the lease as amended by the letter, were being held by the landlord as security.

Equivocal in its effect, and with only a trier of the facts authorized to draw the appropriate inferences from the facts, is Adelman's argument to the Referee that "[n]o reason is set forth [by Witt] why the Bankrupt was required to pay interest, but even if reason existed therefor, the fact remains it was paid under its agreement to deposit security." Equally inconclusive in eliminating alternative hypotheses is Adelman's further contention to this effect: that there is no validity to Witt's "point which is undisputed that the interest on these [the subscription] notes

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[18] See Official Statement and Subscription Agreement.

Agreement Section 11(1), first sentence, reads: "The Agent shall receive and hold all payments of subscriptions for the Notes as and when paid to it, for the account and subject to the direction of the Corporation."

Section 11(f) reads in pertinent part: "* * * The Agent shall not be accountable for the use or application by the Corporation [FC] of any Notes or the proceeds thereof."

[payable *to* Amphitheatre after payment *by* Amphitheatre of its own notes for the unpaid balance of the sums subscribed] does not detract from the basic principle that it [19] was security under the lease because the very statute discussing security states that such money 'with interest accruing thereon, if any, until repaid or so applied shall continue to be the money of the person making such deposit'' etc. The Real Property—General Obligations Law provisions respecting security deposits are, of course, those Adelman intends.

Adelman concludes from the foregoing—(skipping a sentence of the text as not here pertinent)—that ''[t]hese interest payments—(the affiant has, now, somewhat confusingly, switched to a discussion of interest payments made *to,* not *by,* Amphitheatre)—rather than bolstering the position of the Fair Corporation, weakens it because they recognize that the Bankrupt was entitled [to the interest] under the law.''

Here, too, alternative inferences may be drawn from the circumstances cited, and with the one that Adelman rejects, in fact, the more persuasive. First, as to the interest that Amphitheatre was called on to pay under the agreement which modified paragraph 41st of the lease and, concomitantly, the terms of payment of the Amphitheatre subscription agreement:— The unamended provision called for the deposit of the $250,000 Subscription Note within sixty days after the execution of the lease. The due date of the de-

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[19] The word "it" is left dangling by Adelman without a specific referent. Does he intend by "it" to denote the cash outlay of Amphitheatre in acquiring the Subscription Notes or is his meaning the more limited one of the Subscription Notes themselves which the outlay purchased?

posit would, accordingly, have been 7/5/61. Letter memorandum of 7/10/61 [see supra pp. 15, 16] gave FC's consent to an extension of time beyond the sixty days within which to pay for the Note and thereby have it available for deposit under the lease. For its part Amphitheatre agreed as follows: "In lieu of the deposit of such Promissory Notes on such date you [Amphitheatre] hereby pay to us [FC] on the signing hereof the sum of $100,000, receipt whereof is hereby acknowledged, and you [Amphitheatre] hereby deliver to us [FC] your [Amphitheatre's] promissory note for $150,000 personally endorsed by Thomas R. Rudel, payable to us [FC], with interest at the rate of 6% per annum from July 5, 1961, on September 15, 1961." On such latter date the Amphitheatre note was to mature.

The memorandum further committed FC "to hold the $100,000 paid by you [Amphitheatre] simultaneously herewith and the $150,000, when paid in accordance with this agreement and the promissory note herein referred to, in a special trust account and to utilize such monies to satisfy your [Amphitheatre's] obligations under the aforementioned Subscription Agreement (as it may be modified or amended) at the earliest date or dates on which monies will be accepted by the Agent in payment for Fair Corporation's 6% Promissory Notes." [20]

The subscription proceeds were to be used by the FC for the communal purposes specified in the Official Statement.

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[20] It will be recalled that both the Subscription Agreement [Section 13(1)] and the Official Statement (p. 3) stipulated that "each subscription would become effective at the time when subscriptions for an aggregate of $25,000,000 principal amount of Notes shall have been executed and delivered" to FC. The minimum was attained 7/14/61. (See supra p. 15)

Fulfillment of this objective, surely, was the sine qua non that induced Amphitheatre to enter into the lease as tenant. If the money promised by the subscribers was not paid on schedule, the accruing bills could not have been met except from borrowings by the Fair Corporation elsewhere. Such other loans would, routinely, bear interest. That, Amphitheatre was required to pay interest for the period of the extension of time within which to pay the subscription balance is consistent with its status as subscriber. To hold that the requirement for interest as matter of law defines the transaction as the deposit of a cash security by a tenant with its landlord and excludes the alternative hypothesis that it was a loan to a landlord made by a tenant as participant in a joint venture with many others is impermissible without a trial.

Equally clear is it that the interest which was payable to the Amphitheatre, once it had satisfied its subscription price by payment to FC, does not inevitably categorize the transaction as one involving an accrual of interest springing from a security deposit, rather than, and, more naturally, as interest paid by a borrower on a loan.

Discussion:—Real Property Law §233; General Obligations Law § 7-103.[21]

The provisions cited in the caption declare that security deposits made in connection with contracts for the use or

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[21] See fn. 12, supra pp. 34, 35 for text. The General Obligations Law, a reconsolidation of earlier laws relating to various civil obligations effective 9/27/64, restates in its § 7-103 former section 233 of the Real Property Law without any change, except for the incorporation of a definition of "real property" derived from section 2 of the Real Property Law.

rental of realty are trust funds and require that they be held as such for the depositer. The fund must be segregated, and, if it is deposited by the trustee in a bank in compliance with such requirement of the statute, notice of the fact of such deposit must be given to the beneficiary (lessee).

Failure by the lessor to maintain the deposit as a segregated trust fund has been held to be a conversion, entitling the cestui que trust to immediate recovery of the fund, and without right on the part of the defaulting trustee to setoff in minimization or extinction of his liability, notwithstanding that he may have claims against the other in respect of the very obligations the deposit was intended to secure.

The protection that the provision accords the lessee may not in any respect be waived, an attempted waiver being declared to be "absolutely void."

The protection of the law, however, enures only in favor of those standing in the relationships it defines and imposes its obligations and penalties on those whose status is in like fashion established. It does not bar, nor undertake to bring within its operative reach, other relationships, such as arise in respect of loans or purchases to which the landlord and his tenant are parties. The bona fides of the claim that the transaction is extra-statutory must subsist, however, if it is to avoid the non-waiver interdict and requirement to segregate, but no presumption aids the one who assumes to impugn a transaction which, read at face, appears to lie beyond the periphery of the statute's definition. The burden is cast upon the one who charges that legal instruments have meanings and effects other than those they express and that their

true intent is such as to bring them within the force of the statute.[22]

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[22] See as construing the provisions in the sense declared in the text and for illustrative application of such construction, the following: Mallory Associates, Inc. v. Barving Realty Co., 300 N. Y. 297; Barrow Associates, Inc. v. South Broad Realty Corp., N. Y. L. J. 4/22/49, p. 1450 (Sup. Ct. N. Y. County, Pecora, J.) aff'd without opinion, 275 App. Div. 914; 800 Union Street Corp. v. Bookben Realty Co., N. Y. L. J. 11/15/50, p. 1196 (Sup. Ct. Kings County, Smith, Official Referee), modified, irrelevantly, 278 App. Div. 708, aff'd without opinion 302 N. Y. 926; People v. Horowitz, 309 N. Y. 426, Prudential Westchester Corp. v. Tomasino, 5 A. D. 2d 489 (1st Dept.) aff'd without opinion 6 N. Y. 2d 824; Land v. Gladol Realty Corp., 18 Misc. 2d 103 (Sup. Ct. Kings County 1959). (The foregoing cases recognize that in respect of moneys paid by a tenant to his landlord a legal relationship may subsist other than one that presupposes a deposit of security or payment of rent under a lease.) Prudential Westchester Corp. v. Tomasino, one of the cases listed, comments with respect to a "purchase" of equipment from a landlord by a tenant as a concomitant of the execution of a lease, a transaction challenged by the tenant as a subterfuge by the landlord wherein the purchase price was, in fact, a security deposit, that

> "It may be that the lease and bill of sale were the documentary means whereby the parties sought to implement and at the same time disguise the agreement alleged in the complaint; but such an agreement cannot be wrung from the documents alone, and no other evidence of such an agreement was sought to be introduced.
>
> "In relation to the third cause of action, plaintiff proved that defendant had commingled and spent the $35,000 as if they were her own funds, but failed to show that this was wrong. Plaintiff urged that the $35,000 payment was required to be held as a trust fund by section 233 of the Real Property Law and that this requirement could not be waived. While the court is not bound by the label which the parties

(footnote continued on next page)

And as a final caveat: When the proceeding in which the lessee undertakes to make his factual demonstration is a motion for summary judgment and not a plenary trial, ambiguity in the instruments governing, or circumstances constituting, the transaction, permitting alternative inferences, one exonerative, the other inculpatory, to be drawn as to the nature of the transaction, generates an issue that must be resolved in favor of the recipient of the fund claimed by the other to qualify as a security, and requires that the motion be denied.[23]

(footnote continued from previous page)

applied to the payment and may examine the true nature of the transaction (*Matter of New York World-Telegram Corp.* v. *McGoldrick*, 298 N. Y. 11; *Cutler Mail Chute Co.* v. *Crawford*, 167 App. Div. 246), the payment here bore none of the distinguishing characteristics which would render section 233 applicable. There was no proof to show that it was either a deposit as security for the performance of the contract, or that it was an advance to be applied to payments on the contract when due (cf. *Mallory Associates* v. *Barving Realty Co.*, 300 N. Y. 297; *Planetary Recreations* v. *Kerns, Inc.*, 184 Misc. 340)."

Following are a number of cases holding the landlord guilty of conversion for failure to segregate security deposits and barring the landlord's setoff for the tenant's default in suits brought in the tenant's right to reclaim the converted deposit: Joseph B. Ferguson v. Vaughan Imported Cars, Inc., 9 Misc. 2d 188 (App. Term, 1st Dept. 1957); Matter of John Holst Co., 213 N. Y. S. 2d 952 (Sup. Ct. Kings 1961); Sommers v. Timely Toys, Inc., 209 F. 2d 342 (2d Cir. 1954); In re De Gregorio, 219 F. Supp. 783 (S. D. N. Y. 1963). Cf. Bridge Hardware Co. v. Mayer, 131 N. Y. S. 2d 823 (App. Term, 1st Dept. 1954); 160 Realty Corp. v. 162 Realty Corp., 113 N. Y. S. 2d 618 (1952), aff'd without opinion, 280 App. Div. 762 (1st Dept. 1952).

[23] See supra pp. 4, 5 et seq.

Findings of Fact and Conclusions of Law as determined by the Referee

The Referee signed the findings and conclusions proposed by the trustee in the form submitted by him, with only one minor amendment of an amount, not here pertinent. In consequence, the nuances and shadings in the evaluation of the intent of the agreements and of the circumstances in which they were negotiated and were operative became only by adoption the determination of the Referee. Upon the trial of an action such procedure, while not approved,[24] is not necessarily productive of error.[25] In the prosecution of a motion for summary judgment, residual issues of fact are not to be exorcised and caused to vanish by the ipse dixit of vehement advocacy.

It is unnecessary to review the findings and conclusions themselves in any detail. The Referee accepted as established the documented transaction earlier described. In so doing, he necessarily credited the bona fides of the note issue and the deposit of the subscription notes with FC as security. He could not properly find that the financing of the construction and operation of the fair through the interdependent loans subscribed for by many under a joint agreement, and totalling $30,000,000, with interest stipulated at 6% and repayment not due until August 1, 1966, almost a year after the Amphitheatre

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[24] United States v. El Paso Natural Gas Co., 376 U. S. 651, 656, 84 Sup. Ct. 1044, 1047 (1964); Matton Oil Transfer Corp. v. The Dynamic, 123 F. 2d 999, 1001 (2d Cir. 1941); United States v. Forness, 125 F. 2d 928, 942 (2d Cir. 1942), cert. denied 316 U. S. 694, 62 Sup. Ct. 1293.

[25] Edward Valves, Inc. v. Cameron Iron Works, Inc., 289 F. 2d 355 (5th Cir. 1961), cert. denied 368 U. S. 833, 82 Sup. Ct. 55.

lease was scheduled to expire, with prepayment a possibility and partial prepayment of 25% an actuality, was a mere sham and subterfuge, directed at Amphitheatre alone, and contrived, with only Amphitheatre as the target, as a means of evading the effect of the security statute. That finding and conclusion was barred, however, not because the proof by affidavit and exhibit was preponderantly to the contrary, as it surely was. The bar, rather, was compelled, through the circumstance that the Referee could thus find and conclude only by preferring one inference drawn from the facts over another. To grant the motion for summary judgment he would have had to choose the inference that the lease provision and subscription agreement in their contextual frame were no more than a facade and fiction, and simultaneously to have rejected the inference that they were genuinely what they purported to be. Such choice is reserved for the trier of the facts alone. On a motion for summary judgment, if dual or multiple hypotheses may reasonably be educed, the choice that defeats the motion is compelled.

The Referee, correctly, therefore, made no finding that what had been done had for its purpose the circumvention of the statute. This fulcral finding that "[t]he money in the amount of $251,125[26] advanced by or on behalf of Amphitheatre to the Fair Corporation was *intended* to be and at all times and still is security under the lease" is, however, erroneous both in assuming to adjudicate intent on a motion for summary judgment,

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[26] This is probably an oversight by the Referee. To be consistent the amount should read $250,000. The higher figure which appeared in two other places in the findings and conclusions as proposed was amended by the Referee's hand to read $250,000.

and, in any event, in the absence of a showing, that the intent was other than as FC, pointing to the letter of the legal documents, averred. Equally in error is the conclusion of law, with no support in any finding, that the lease provision "was intended to [be] and constituted a waiver of the provisions of Section 233 of the Real Property Law."

The reasons which require denial of the Amphitheatre cross-motion for summary judgment apply with equal force in rejecting FC's contention that the counterclaim should be summarily dismissed. The denial of the summary judgment motions, moreover, leaves open for later disposition, but only in the event the question is reached upon the plenary hearing hereby directed, FC's contention that "[i]n any event, there was no justification for requiring payment to the trustee of the sum [of $62,500] paid in partial redemption of the Notes."

Settle order on notice.

GEORGE ROSLING
U. S. D. J.

Memorandum and Order of Dooling, J., Dated February 29, 1968

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances:

AMBROSE DOSKOW, ESQ., (Messrs. Rosenman, Cohn, Kaye, Petschuk, Freund & Emil, of Counsel) for petitioner New York World's Fair 1964-1965 Corporation.

SAMUEL P. ADELMAN, ESQ., (Robert P. Herzog, Esq. and Alexander Henkin, Esq., of Counsel) for the Trustee of the Bankrupt.

DOOLING, D. J.

The petitioner landlord, the New York World's Fair 1964-1965 Corporation ("the Fair"), seeks a reversal of a decision holding that it had converted the security deposit of its tenant, the bankrupt Amphitheatre, Incorporated ("Amphitheatre"), in violation of N. Y. Real Property Law §233 (now General Obligations Law §7-103), that the Fair had thereby forfeited its right to resort to the security to satisfy its claim for delinquent rent and damages, and that the Fair was required to turn over the security deposit and interest to Amphitheatre's trustee in bankruptcy. The order of the learned Referee must be reversed and the Fair permitted to proceed on its Proof of Claim and to resort to the security.

In early 1961 the promoters of Amphitheatre wished to rent the 1939-1940 "New York State Amphitheatre and

Exhibit Building''—at which the ''Aquacade'' performances had been given—in order to present a commercial entertainment there during the 1964-1965 New York World's Fair, then in the planning stage. Negotiations in February and March 1961 led to an agreement to lease the premises for the period January 1, 1962 through the Fair's closing date in 1965; the printed lease was signed on May 5, 1961. Paragraph Forty-first of the lease, so far as material, provided—

> ''Within sixty days after the execution of this lease by [Amphitheatre] and delivery thereof to the Fair . . ., [Amphitheatre] shall deposit with the Fair . . . $250,000 principal amount of the Fair Corporation's 6% Promissory Notes, purchased from the Fair . . . by [Amphitheatre] as security for the full . . . performance of . . . the terms . . . of this lease . . . After the end of the Term and upon condition that [Amphitheatre] shall then be nowise in default . . . and shall have restored the Premises as required herein, and upon written request therefor by [Ampitheatre], the Fair . . . will return the security to [Amphitheatre], less . . . any . . . damages . . . by reason of any breach or default by [Amphitheatre] under this lease.''

The history of the negotiation was that at first—on March 13, 1961,—the Fair sought to have Amphitheatre furnish a $750,000 surety-company performance bond, and Amphitheatre sought to avoid that costly expedient and to present instead the personal guaranty of one of the promoters. The Fair suggested, as an alternative, putting up as security Notes of the Fair's forthcoming $40,000,000 issue; by March 23, 1961, the parties were in an agreement

that Amphitheatre would buy $250,000 of the Notes and put them up as lease security.

The evidence is clear that neither Amphitheatre nor any of its promoters would have bought World's Fair Notes at par as an investment, and that their undertaking to buy the Notes from the Fair and put them up as security under the lease was a part, and a substantial part, of the consideration that they paid for the lease. The evidence is equally clear that the Fair wished to get subscriptions for the Notes, particularly from prominent exhibitors and amusement area lessees, in order to fill up the quota of $25,000,000 of subscriptions required, under the terms of the Subscription Agreement, to launch the Note issue by making all the individual Subscriptions effective. There was no "agreement" at any time before the lease between the Fair and Amphitheatre was signed on May 5, 1961, that Amphitheatre would "deposit" money as security, and if that possible alternative was ever canvassed during the discussions before March 23, 1961, no written vestige of it survives, and there is no intimation of any sort that the Fair was ever for an instant receptive to the idea.

The lease of May 5, 1961, in paragraph Forty-first, then, correctly integrated the real agreement of the parties on the security point. The paragraph was not a sham; it was not a subterfuge; it was not a disguise; it was what the parties negotiated to and agreed upon. If at this stage Section 233 was violated it could only be because what the lease called for necessarily would violate the section, and not because the true transaction is not fully and fairly reflected in the lease. Judge Rosling pointed out on the earlier review in this matter that "no presumption aids the one who assumes to impugn a transaction which, read

at face, appears to be beyond the periphery of the statute's definition. The burden is cast upon the one who charges that legal instruments have meanings and effects other than those they express and that their true intent is such as to bring them within the force of the statute." *Cf. Prudential Westchester Corp.* v. *Tomasino,* 1st Dept. 1958, 5 App. Div. 2d 489, 172 N. Y. S. 2d 652, *aff'd.,* 1959, 6 N. Y. 2d 824, 188 N. Y. S. 2d 214. The evidence incontrovertibly demonstrated that the true intent of the parties was truly expressed in their contract.

While further questions arise out of later events, the first question is whether such an arrangement as that of paragraph Forty-first is invalid on the theory that (a) it first provides that "money shall be deposited" (*i.e.,* in the paying of money to the Fair in exchange for Notes) "as security for performance of the contract" within the meaning of Section 233, and, (b) it then seeks—ineffectually—to waive the holding-in-trust requirement by converting the deposit into a loan-against-Notes, which would entitle the Fair to mingle the "deposited" money with its "personal moneys" and to treat the money as its own "asset",—ineffectually seeks to waive because Section 233 makes "Any provision of such a contract whereby a person . . . waives any provision of this section . . . absolutely void." The essence of the argument is that since the statute expressly forbids any "waiver", even if it is a part of the very contract involving the alleged "deposit", it necessarily follows that any payment to a landlord is within the statute, no matter what the form of contracting, if it results in the tenant's being a mere creditor for his security payment rather than a *cestui-que-trust;* for that, it is argued, is precisely what the statute was meant to prevent, and it meant also to prevent people from contract-

ing out of the statute. So here, paragraph Forty-first plainly requires a payment to the landlord—for it requires that the notes be bought from the Fair and not in the market—and yet the payment flows through the Notes into the Fair's treasury to be mingled with its "personal moneys" and to "become an asset" of the Fair.

The argument is formidable, but, as Judge Rosling pointed out on the earlier review, the statute, "does not bar, nor undertake to bring within its operative reach, other relationships, such as arise in respect of loans or purchases to which the landlord and his tenant are parties." *800 Union Street Corp.* v. *Bookben Realty Co.*, Kings Co., Official Referee, 1950, N. Y. L. J. Nov. 15, 1950, p. 1196, *aff'd.* in relevant part, 2d Dept. 1951, 278 App. Div. 708, 709, *aff'd.*, 1951, 302 N. Y. 926, is certainly to that effect; the Court there dealt with a provision for a security payment that the landlord was authorized by the lease to use to pay down the mortgage on the premises; the Court held the provision valid, and handled the tenant-to-landlord loan, which was altogether silent on the point of repayment date, by decreeing that there was an implied duty to "repay" the loan within a reasonable time by making payments into a statutory segregated trust, there to be held as security for the tenant's performance until the lease ended. *Barrow Associates* v. *South Broad Realty Corp.*, N. Y. Co. 1949, N. Y. L. J. Apr. 22, 1949, p. 1450, *aff'd.*, 1st Dept. 1949, 275 App. Div. 914, 90 N. Y. S. 2d 499 reached the same conclusion, and so did *Land* v. *Gladol Realty Corp.*, Kings Co. 1959, 18 Misc. 2d 103, 187 N. Y. S. 216. These were cases where the money paid to the landlord was used as his own but for a purpose relevant to the lease—paying down a mortgage in the first case, acquiring title to the leased premises in the other cases. They require the conclusion that the clause prohibiting

waivers does not have the effect of converting a payment to a landlord of money in a security context into an involuntary statutory trust if the lease provides a specific purpose for which the landlord is to use the money and the landlord does so use the money. As Judge Rosling put it, "The protection of the law . . . enures only in favor of those standing in the relationships it defines and imposes its obligations and penalties on those whose status is in like fashion established." It does not reach the type of status created by the present lease, and the lease clause is not invalid. The Note issue loan, of which the Amphitheatre money was to form a part, was, as the parties recognized, to pay the Fair's cost of construction and pre-opening expenses, including the expense (except for $75,000 to be paid by Amphitheatre) of rehabilitating the Amphitheatre premises. The Note issue was the *sine qua non* of the whole Fair venture and indispensable to Amphitheatre's entertainment project. (Note lease paragraph Twenty-ninth).

Paragraph Forty-first could not operate as intended. In the earliest printed proof (April 8) it had been provided that the Notes would be delivered at the lease closing, but the proposed Note issue was apparently making heavy weather, and by the time of the lease proof of April 28 it had evidently become clear that there would be no Notes available on the closing date, and the parties revised paragraph Forty-first to provide for delivery of the notes within 60 days after execution of the lease. The Notes, then, were due to be delivered on July 5, 1961.

The Notes, to mature August 1, 1966, were to issue pursuant to the terms of a Subscription Agreement between the Fair and The Chase Manhattan Bank to individual purchasers who signed separate, individual Sub-

scriptions. Accordingly, on June 15, 1961, a Subscription was sent to Amphitheatre, which signed the Subscription under date of June 21, 1961; the Fair accepted the Subscription under date of June 26, 1961; the Subscription had written into it, by Amphitheatre, "In accordance with agreement [*i.e.*, the lease] of May 5, 1961".

It soon became apparent that the Notes would not be available by July 5, 1961. Moreover, the Subscription and Subscription Agreement did not require the subscriber to advance or the Fair to accept the loan funds except 40% when the subscriptions became effective and 20% on January 1st of each of the years 1962, 1963 and 1964. By exchanges between July 5 and July 10, 1961, a letter agreement, dated July 10, 1961, was arrived at which bridged the gap; it provided that in lieu of depositing the Notes Amphitheatre would pay the Fair $100,000 forthwith and give it an interest-bearing note, due September 15, 1961, for $150,000. The letter agreement then continued—

> "We agree to hold the $100,000 paid by you simultaneously herewith and the $150,000, when paid in accordance with this agreement and the promissory note herein referred to, in a special trust account and to utilize such monies to satisfy your obligations under the aforementioned Subscription Agreement (as it may be modified or amended) at the earliest date or dates on which monies will be accepted by the Agent in payment for the Fair Corporation's 6% Promissory Notes. Such Promissory Notes to be issued to you pursuant to the aforesaid Subscription Agreement shall thereafter be held by us in accordance with the provisions of Article Forty-first of our aforesaid Agreement of Lease."

Memorandum and Order

On July 14, 1961, the Subscription Agreement and the individual Subscriptions became effective with the reaching of the $25,000,000 quota; as of that same date the Fair received the $100,000 in money for Amphitheatre's account and the $150,000 Amphitheatre note. The Subscription Agreement between the Fair and The Chase Manhattan Bank was amended under date of August 1, 1961, so as to provide that a subscriber could pay his subscription at the scheduled dates or such earlier dates as he elected. On August 15, 1961, Amphitheatre sent a check for $150,000 to the Fair, stating that it completed "our commitment to you to purchase $250,000 of your bonds. It is our understanding that you will hold these in lieu of a performance bond until the termination of the Fair". On the next day the Fair sent the $150,000 check to the Chase Bank stating that it was in payment of the balance of Amphitheatre's subscription. (It may be added that no one other than Amphitheatre so elected to prepay a Note subscription.)

It is not suggested that the letter agreement of July 10, 1961, was not punctiliously complied with; the learned Referee so found (Finding 33). The Notes were issued under date of July 21, 1961 (for $100,000) and under date of August 17, 1961 (for $150,000) in the name of Amphitheatre, and they were delivered to and held by the Fair; Amphitheatre did not endorse the Notes. Interest on the Notes was paid directly to Amphitheatre. It is not suggested that the Fair failed to hold the Notes in a proper manner.

The learned Referee appeared to consider the July 10, 1961, transaction and the amendment of the Subscription Agreement in some way suspicious (see, *e.g.*, Finding 32), but it is plain that they were utterly straightforward. The lease term did not begin until January 1, 1962; while

the unavailability of the Notes on July 5, 1961, frustrated a closing then, and the oversight respecting the installment nature of the loan plan of the Note issue was a cognate embarrassment, particularly to the Fair, self-evidently neither party considered that the lease should be declared at an end as for a default on either side, or the deal given up; for the same reasons, obviously, that they had signed a lease in the first place, they patched it up, when paragraph Forty-first proved to be temporarily inoperable, by executing the July 10, 1961, letter agreement. No doubt the Fair was bound to make it possible for Amphitheatre to perform the Note commitment (*cf. Murphy* v. *North American Light & Power Co.*, 2d Cir. 1939, 106 F. 2d 74, 80-81), and it very sensibly and expectably did so by procuring the amendment of the Subscription Agreement, as adumbrated in the July 10, 1961, letter of agreement.

It is true, too, that the identification of the Notes in paragraph Forty-first is so meagre that no one except the parties could say with absolute certainty what Notes were meant to be referred to (*cf.* Finding 36). But the identification was complete so far as the parties were concerned; what may seem to strangers somewhat indefinite in its reference was to them perfectly specific.

The learned Referee pointed to the "use" of the two payments aggregating $250,000 to buy the Notes (in pursuance of the terms of the letter agreement of July 10, 1961) (see Finding 33), and it must be these acts that he held to constitute the conversion referred to at pages 98-99 of the learned Referee's painstaking opinion. There can be drawn from *Mallory Associates* v. *Barving Realty Co.*, 1949, 300 N. Y. 297, 302, an implication that, even if the substance of the agreement between landlord and tenant is

that money paid in advance by the tenant is to be applied toward the landlord's purchase of the property, and is thereafter to be repaid to the tenant as a loan amount, nevertheless the landlord must, until he applies the money as agreed to the purchase, hold the money in trust until it is so applied. Generalized, that may signify that any money paid by a tenant to a landlord in a "security" context is initially within Section 233 of the Real Property Law even though the agreement is that the landlord will apply the money to a particular stated purpose, for the period that must elapse until the money is applied to the agreed-upon purpose; any commingling of the money before the time of application or any diversion of it to a use other than that agreed upon would be a breach of the statutory trust. (*Cf. Bogart Packing Co.* v. *John-Jordan, Inc.*, N. Y. Co. 1950, 102 N. Y. S. 2d 133 (statute breached if money, paid over to be used for alterations and improvements and to be "applied" to last half-year rent, is neither used for the alterations or repairs, or "held in trust until so applied".); *Land* v. *Gladol Realty Corp.*, Kings Co. 1959, 18 Misc. 2d 103, 105, 187 N. Y. S. 2d 216, 218. But *cf. 800 Union Street Corp.* v. *Bookben Realty Corp.*, Kings Co. Official Referee, 1950, N. Y. L. J. 11/15/50, p. 1196, *aff'd.*, 2d Dept. 1951, 278 App. Div. 708, 709, 103 N. Y. S. 2d 359, 361-362, *aff'd.*, 1951, 302 N. Y. 926.) Even on this analysis, a temporary commingling, unaccompanied by any detriment flowing from the transitory breach of statutory duty, would not forfeit the landlord's right to resort to the security and would not require him to return it, if he segregates the security money seasonably. *160 Realty Corp.* v. *162 Realty Corp.*, N. Y. Co. 1952, 113 N. Y. S. 2d 618, *aff'd.*, 1st Dept. 1952, 280 App. Div. 762, 113 N. Y. S. 2d 678. But in the present case there was no commingling before the Notes were bought. The escrow

or trust contemplated by the letter of July 10, 1961, was evidently carried out exactly as intended by applying the money to the purchase of Notes as soon as Notes and the second payment of $150,000 were available. The Notes were then and thereafter held as security as contemplated by paragraph Forty-first, the letter agreement of July 10, 1961, and Amphitheatre's letter of August 15, 1961.

Much was made at the trial, in the briefs and on the argument of the petition for review over the question whether Amphitheatre had ever offered a cash deposit. If that were a material fact, it would not be possible, by the standard of General Order 47, to support a finding, on the whole record shaken down to its very modest genuine testimonial content, that Amphitheatre ever meaningfully proposed a cash deposit to the Fair in the early days of the discussion, or, indeed, at any time; but the point is immaterial since there is no suggestion, even in the Davis-Becker versions of the negotiation, that the Fair ever assented to the injection of that possible alternative into the negotiation, or that it was ever agreed to by the Fair and thereafter abandoned, or disguised, or transmuted into paragraph Forty-first. (See Davis, Exhibits C, H, E, Tr. 52-55, 57-58, 59, 67-70, 70-71, 71-74, 163-165, 167-168, 185-186; Becker, Exhibits 5 I, Tr. 87-89, 90-96, 100, 102-104, 105, 107-108, 115, 116 [Exhibit I]—118, 119 [Exhibit I]—120, 121, 135-136, 137-138, 141-144, 150-151, 154-155; *cf.* Weinstein Tr. 231).

Much too was made of the interest point. Since the Fair was to have had the use of the money from July 5, 1961, payment of interest on the late payment was evidently considered appropriate. It does not appear what, if any, counter-adjustments were made when interest was com-

puted and paid on the Notes. In any case, the interest matter throws no light on the characterization of the transaction under review in the perspective of Section 233.

Since there was no misuse of a statutory deposit of money and, in necessary consequence, no breach of a statutory trust, the statutory consequence of such a breach (*cf. Matter of Perfection Technical Services Press, Inc.*, 2d Dept., 22 App. Div. 2d 352, *aff'd.*, 18 N. Y. 2d 645, 273 N. Y. S. 2d 71; *Fore Improvement Corp. v. Selig*, 2d Cir. 1960, 278 F. 2d 143) does not follow. The Fair is entitled to resort to the security.

Accordingly, it is

ORDERED that the order of the Referee herein dated November 28, 1967, is reversed and the matter is remanded for further proceedings not inconsistent with this decision.

Brooklyn, New York
February 29, 1968

/s/ JOHN F. DOOLING
United States District Judge

Referee's Decision Dated September 5, 1967

Decision on Petition of New York World's Fair 1964-1965 Corporation's Motion for the Trustee to Vacate Amphitheatre's Premises, and Trustee's Cross Motion for Summary Judgment on the Fifth, Sixth and Seventh Counterclaims in His Answer to the Petition of Said Corporation

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 64B 602

IN THE MATTER

OF

AMPHITHEATRE, INCORPORATED

Bankrupt.

Appearances

SAMUEL P. ADELMAN and ROBERT P. HERZOG, ESQS., Attorneys for Trustee, Samuel P. Adelman, Esq., Of Counsel.

ROSENMAN, COLIN, KAYE, PETSCHEK & FREUND, ESQS., Attorneys for New York World's Fair 1964-1965 Corporation, Ambrose Doskow, Esq., Of Counsel.

SHERMAN D. WARNER, Referee

On or about June 29, 1964, Amphitheatre, Incorporated filed its petition for an arrangement under Chapter XI of the Bankruptcy Act. The debtor was continued in pos-

session until, by its consent, it was adjudicated bankrupt on December 15, 1964. The bankrupt will be referred to herein as the Producer, the Bankrupt, the Debtor, or Amphitheatre.

It entered into an agreement of lease, dated May 5, 1961, (herein called the lease,) with New York World's Fair 1964-1965 Corporation, (herein called the Fair Corporation) whereby the Fair Corporation leased to Amphitheatre, Incorporated, the Producer, premises known as the New York Amphitheatre and Exhibit Building, (herein called the premises) for a term commencing January 1, 1962 and expiring, unless sooner terminated, on the final day of the New York World's Fair in 1965. The Producer purchased $250,000 principal amount of Fair Corporation 6% promissory notes (herein referred to as notes) which, according to Article Forty-First of the lease, were to be deposited with the Fair Corporation within sixty days after the execution of the lease as security for the full, faithful and prompt performance of and compliance with, on the part of the Producer, all of the terms, covenants, agreements and conditions of said lease on its part to be performed, kept and observed.

The issue in this controversy is the alleged violation of New York Real Property Law, Section 233, (Now Section 7-103, New York General Obligations Law) by the purchase of said notes as security.

After the lease was executed, and with a letter dated June 15, 1961 (Fair Exhibit D, 6/23/66) sent by the Comptroller of the Fair Corporation, the Producer received three documents in connection with the purchase of Fair Corporation notes: (1) a Subscription; (2) a Subscription Agreement, and (3) an Official Statement

dated April 10, 1961. The Official Statement was equivalent to a prospectus of the Fair Corporation's total projects, activities, and estimated costs of construction, operating expenses and estimated revenues; and stated the method of payment of subscriptions, and the anticipated use of the proceeds of a $40 million offering of its promissory notes. Subscriptions in excess of $5,000 were payable in installments on specified dates, viz: $5,000 or 40% of the amount subscribed, whichever is greater, on the closing date and the balance in three installments—33⅓% on January 1, 1962, 33⅓% on January 1, 1963, and 33⅓% on January 1, 1964. The closing date was to be fixed by the Fair Corporation when it ascertained that subscriptions for its 6% notes aggregated $25,000,000. (Fair Exhibit G, 6/23/66, Par. 13(1)).

The Subscription Agreement sets forth at length the rights, obligations and duties of the Fair Corporation and subscribers to the notes. This did not contain the subscription.

The Subscription referred to the subscription agreement and incorporated its terms and conditions by reference and provided for the method of payment by the subscriber to the Fair Corporation's notes. The terms of payment were set forth in similar language in each of said documents.

On June 21, 1961, Mr. Meyer Davis, the President of Amphitheatre, signed the printed form of subscription, adding a legend in his own handwriting "in accordance with agreement of May 5, 1961." (Fair Exhibit E, 6/23/66). The subscription was accepted by the Fair Corporation on or about June 26, 1961. By letter dated July 14, 1961 (Trustee's Exhibit 11, 7/19/66) Mr. Thomas Rudel, the Treasurer of Amphitheatre, mailed his personal

check for $100,000 and Amphitheatre's promissory note dated July 5, 1961, due September 15, 1961, in the sum of $150,000. bearing interest at 6% per annum, and guaranteed by Mr. Rudel, to the Fair Corporation, attention of Mr. Erwin Witt, its Comptroller, together with an acceptance of the Fair Corporation's proposition dated July 10, 1961. Fair Corporation's proposition was set forth in a letter agreement, dated July 10, 1961, (Fair's Exhibit J, 7/19/66), which modified Article Forty-first of the Lease so that in lieu of a deposit of Fair Corporation Promissory notes within sixty days there would be paid on behalf of Amphitheatre to the Fair Corporation the aforesaid $100,000 by check and $150,000 by said promissory note, the proceeds of which the Fair Corporation would hold until the earliest date when moneys will be accepted by the Chase Manhattan Bank as Agent in payment of notes, at which time the notes would be issued to Amphitheatre, Incorporated, but would be held by the Fair Corporation in accordance with Article Forty-first of the Agreement of Lease.

Subscriptions for an aggregate of $25 million principal amount of notes having been received on or about July 14, 1961, (Fair Exhibit B, 6/22/61 [sic *]) Amphitheatre's scription became effective and the first note for $100,000 payable to Amphitheatre, Inc. was dated July 21, 1961.

Mr. Rudel's payment of $100,000 to the Fair Corporation could be accepted because it was 40% of the total subscription of $250,000, but Amphitheatre's next payment under its subscription and the subscription agreement could not be made until January 1, 1962. Therefore the Fair Corporation and its Agent Bank promulgated and adopted Amendatory Agreement No. 3 as of August 1, 1961, (Fair

* "66" was probably intended.

Exhibit K, 7/19/66) amending the Subscription Agreement to permit a subscriber to pay the balance of its subscription at such earlier time as it may elect. Thereafter, by letter of August 15, 1961, (Fair Exhibit L, 7/19/66) Mr. Rudel wrote to the attention of Mr. Erwin Witt (Fair Corporation's Comptroller) saying:

> "Attached please find our check for $150,000 which completes our commitment to you to purchase $250,000 of your bonds. It is our understanding that you will hold these in lieu of a performance bond until the termination of the Fair."

Thus Amphitheatre's note was paid before maturity, and on the next day Mr. Witt wrote to the Chase Manhattan Bank as Agent (Fair's Exhibit M, 7/19/66) enclosing the $150,000 check from Amphitheatre in payment of the balance of its subscription and said:

> "When the notes are complete in accordance with the contract with Amphitheatre, Inc. dated July 14, 1961, please transmit the two Corporate notes for $100,000 and $150,000 to this office as security to be held by us as provided in their lease."

The second note for $150,000 was dated August 17, 1961, and made payable to Amphitheatre, Inc., photo-copies of both notes, face and reverse, are Fair's Exhibit N, 7/19/66. The contract of July 14, 1961 above mentioned presumably referred to Mr. Rudel's letter to Mr. Witt (Trustee's Exhibit 11, 7/19/66) transmitting his $100,000 check and the acceptance of the letter agreement dated July 10, 1961.

These notes were held by the Fair Corporation until November 1961. After November 1961 they were held by

the Agent until an order was made in this proceeding dated May 6, 1966 (Trustee's Exhibit 7, 6/23/66) which required the Fair Corporation to deposit the principal represented by said notes, together with accrued interest, in an interest bearing time account to be entitled "New York World's Fair 1964-1965 Corporation security account in trust for the estate of Amphitheatre, Incorporated, Bankrupt," and upon making said deposit Bankrupt would have no further interest in or claim to any of the promissory notes issued by the Fair Corporation to Amphitheatre.

The deposit has been made in Marine Midland Grace Trust Company of New York and as of February 15, 1967 amounts, with interest, to the sum of $294,915.64.

The rights of the parties to this fund is the subject of this decision.

Article Forty-first of the Agreement of Lease of May 5, 1961 is as follows:

> "Forty-first: Within sixty days after the execution of this lease by the Producer and delivery hereof to the Fair Corporation, the Producer shall deposit with the Fair Corporation (and shall keep deposited throughout the Term) $250,000 principal amount of the Fair Corporation's 6% Promissory Notes, purchased from the Fair Corporation by the Producer, as security for the full, faithful and prompt performance of, and compliance with, on the part of the Producer of all of the terms, covenants, agreements and conditions of this lease on its part to be performed, kept and observed. So long as the Producer is not in default under this lease, the Producer shall be entitled to receive the interest paid on such Notes. In addition to any and all other remedies

> available to it under this lease or otherwise, the Fair Corporation shall have the right, at its option, at any time and from time to time, to use the security or any part thereof in whole or partial satisfaction of any of its claims or demands against the Producer. * * *"

The parties to the lease realized soon after it was signed that the producer might not be able to deposit the security notes as required by Article Forty-first, and so that Article was modified by the letter agreement of July 10, 1961 (Fair's Exhibit J, 7/19/66) signed by Mr. Witt on behalf of the Fair Corporation and address [sic] to Amphitheatre, accepted and agreed to on behalf of Amphitheatre by Leon Leonidoff, Secretary, and Thomas Rudel, Vice-President and Treasurer. This letter agreement provides:

> "Article Forty-first of the Agreement of Lease between us, dated May 5, 1961, requires you to deposit $250,000 principal amount of the Fair Corporation's 6% Promissory Notes with us within 60 days after the execution of the Agreement of Lease.
>
> "You have executed and delivered to the Chase Manhattan Bank, as Agent, a Subscription Agreement subscribing for $250,000 principal amount of such Promissory Notes.
>
> "We hereby consent and you hereby agree as follows:
>
> "In lieu of the deposit of such Promissory Notes on such date, you hereby pay to us on the signing hereof the sum of $100,000, receipt whereof is hereby acknowledged, and you hereby deliver to us your promissory note for $150,000 personally endorsed

by Thomas R. Rudel, payable to us, with interest at the rate of 6% per annum from July 5, 1961, on September 15, 1961.

"We agree to hold the $100,000 paid by you simultaneously herewith and the $150,000, when paid in accordance with this agreement and the promissory note herein referred to, in a special trust account and to utilize such monies to satisfy your obligations under the aforementioned Subscription Agreement (as it may be modified or amended) at the earliest date or dates on which monies will be accepted by the Agent in payment for the Fair Corporation's 6% Promissory Notes. Such Promissory Notes to be issued to you pursuant to the aforesaid Subscription Agreement shall thereafter be held by us in accordance with the provisions of Article Forty-first of our aforesaid Agreement of Lease.

"Except as modified hereby, the Agreement of Lease between us, dated May 5, 1961, is ratified, affirmed and declared to be in full force and effect."

An undated draft of the letter agreement of July 10, 1961 (Trustee's Exhibit 9A, 7/19/66), with the notation at the top: "Draft HW/SW(7.5.61)" was sent by Howard Weinstein by letter dated July 5, 1961, to Harold H. Stern, Esq. (Trustee's Exhibit 9, 7/19/66). Mr. Stern was an attorney representing the Producer and Mr. Weinstein was a member of the firm of the Fair Corporation's attorneys. The draft having been approved, Mr. Weinstein, by letter of July 7, 1961, addressed to Mr. Stern (Trustee's Exhibit 10, 7/16/66) sent three copies of the proposed agreement and a promissory note to be executed by Amphitheatre, and he said:

Decision

"Would you please have two copies of the agreement and the ribbon copy of the note executed and delivered to Mr. Witt along with the $100,000. He will then sign and return to you one copy of the agreement."

Mr. Rudel's letter of July 14, 1961 (Trustee's Exhibit 11, 7/16/66) transmitted to Mr. Witt the check, the note and "an acceptance of your proposition dated July 10, 1961."

It is pertinent to note from that letter agreement that the Fair Corporation agreed to hold, and did hold the $100,000 paid by Amphitheatre when it signed the letter agreement and the promissory note therein referred to, and the $150,000 when paid in accordance with that agreement in a special trust account until it was used to purchase the Fair Corporation's 6% Promissory Notes. At no time prior to the purchase of the notes were the cash payments made by the Producer mingled with the personal funds of the Fair Corporation.

Our consideration is thus narrowed and limited to the liability of the Fair Corporation to Amphitheatre by reason of its use of its notes as security under the lease as modified.

Under Paragraph 2 of Article Thirty-third of the agreement of lease the insolvency of the Producer or the filing by it of a petition for an arrangement, constituted cause for the Fair Corporation to terminate the term and the rights of the Producer thereunder.

After adjudication the Fair Corporation filed its petition dated December 29, 1964 for an order directing the trustee

in bankruptcy to vacate the premises and to surrender possession thereof.

To the Fair Corporation's motion for summary judgment on its petition the trustee filed his answer, set-offs and counterclaims, and made a cross motion for summary judgment on the Fifth, Sixth and Seventh counterclaims in said answer, for $250,000, that the Fair Corporation had allegedly converted in violation of Section 233 of the New York Real Property Law.

The Fair Corporation having also moved for summary judgment dismissing said counterclaims, the Fair Corporation and the trustee submitted their respective findings of fact and conclusions of law and stipulated that the Referee render his decision thereon. This Referee granted the cross motion of the Trustee for summary judgment and by order dated February 8, 1965, ordered the Fair Corporation to pay to the Trustee the sum of $250,000 with interest thereon. The Fair Corporation reviewed said Referee's order, and the District Court by order dated May 3, 1965, sustained said petition for review, reversed said order and returned the record to the Referee to determine the issues raised by the Fifth, Sixth and Seventh counterclaims in the answer of the Trustee and the reply of the Fair Corporation thereto, in accordance with the opinion of the Court filed April 27, 1965.

Judge Rosling, in his learned and exhaustive opinion sustaining the petition for review held:

> "The factual issues tendered by the counterclaims and by F.C.'s (Fair Corporation's) reply thereto require a plenary trial by the Referee, and are, accordingly, remanded to him for such trial in con-

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formity with the legal principles noted herein as applicable.

• • •

"Basic is the principal that "Summary judgments are not appropriate 'where motive and intent play leading roles.'" In this connection it is to be noted that the parties stipulated as to the documents which the Referee might consider in determining the motion for summary judgment. These documents evince a sharp disagreement between the parties as to the central factual element, namely, whether the preliminary negotiations for the lease were sincere and genuine in their creation of a documented loan relationship between the parties or were a mere pretense designed to dress up a security transaction so that it would be masked as a loan from tenant to landlord whereby the monies to the lessor's behoof might be freed of the non-waivable trust restrictions imposed by law and be used without exposing the user to criminal sanctions. (5)

• • •

"But even if the evidentiary facts were wholly stipulated and the parties in agreement except as to the inferences of fact to be drawn from the facts, and joining in reciprocal motions for summary judgment, those motions must be denied if alternative inferences were reasonably deducible. • • •"

See Footnote numbered 5 where the Judge says:

"Diversion by the landlord of security deposited under a lease is denounced as a misdemeanor under New York State Penal Law Section 1302-a, and possibly, and more seriously under Sections 1290 and 1302."

Decision

In accordance with said opinion a trial ab initio of the issues raised by the Fifth, Sixth and Seventh counterclaims in the answer of the Trustee, dated January 4, 1965, and the reply of the Fair Corporation thereto, dated January 22, 1965, was held before this Referee on the 22nd and 23rd of June, 1966 and the 19th of July, 1966, at which the testimony of witnesses was taken and the exhibits of the parties were introduced in evidence in accordance with the record herein.

The issues raised by said pleadings may be summarized as follows:

Fifth Counterclaim: Alleges that pursuant to Paragraph Forty-first of the Agreement of Lease Amphitheatre was required to deposit with the Fair Corporation security for the full, faithful and prompt performance on the part of Amphitheatre of the terms of said lease the sum of $250,000, and in compliance with said paragraph Forty-first there was delivered to the Fair Corporation a check dated July 17, 1961, in the sum of $100,000 and an additional check dated August 15, 1961, in the sum of $150,000, which checks were delivered to and deposited to the credit of the Fair Corporation. The Fair Corporation denies these allegations but admits that said checks were delivered to the Fair Corporation and deposited to its credit, and alleges that said checks were received by the Fair Corporation for its notes pursuant to the subscription agreement executed by the Bankrupt.

The Twenty-first, Twenty-second and Twenty-third paragraphs of the Fifth counterclaim allege that pursuant to Section 233 of the Real Property Law then in effect (now General Obligations Law, Section 7-103) the $250,000 so deposited as security for the performance of the afore-

said agreement of lease with interest thereon continued to be the money of Amphitheatre and was required to be held in trust by the Fair Corporation and not mingled with personal monies or become an asset of Fair Corporation, and that contrary to said provisions of law, Fair Corporation did not hold the said sum of $250,000 in trust as required, but mingled, or caused to be mingled, the said sum of $250,000 with its other personal monies and did wrongfully and unlawfully convert and appropriate the said sum of $250,000 to its own use, and that the trustee is entitled to the immediate repayment of said sum with interest. Fair Corporation denies each and every allegation contained in these paragraphs Twenty-first, Twenty-second and Twenty-third.

In his Sixth counterclaim, the Trustee additionally alleges that as a condition to the making of the lease the Fair Corporation required Amphitheatre to execute and deliver to the Chase Manhattan Bank as Agent for the Fair Corporation a subscription for $250,000 principal amount of the Fair Corporation's 6% promissory notes, and that in furtherance of said condition precedent Fair Corporation transmitted the checks totaling $250,000 to the Chase Manhattan Bank for which notes of the Fair Corporation in that amount were issued to Amphitheatre, but never delivered to Amphitheatre but were held in a safe keeping account for and on behalf of the Fair Corporation as required under said lease; that the foregoing transaction was a device intended to be a subterfuge to circumvent the provisions of the statute above quoted and in violation of the non-waiver provision in said statute, and that the subscription agreement was and is absolutely

void and the Trustee is entitled to the return of said $250,000 with interest. Fair Corporation denies each and every allegation contained in Paragraph Sixth of the counterclaim, except that it admits that the Fair Corporation caused to be transmitted to the Chase Manhattan Bank the two checks referred to, for which 6% promissory notes of the Fair Corporation in the principal amount of $250,000 were issued to the Bankrupt and were held in safekeeping as security required under the lease.

In his Seventh counterclaim the Trustee additionally alleges that upon receipt of said sum of $250,000 from Amphitheatre the Fair Corporation became the trustee of said money and was under a duty and obligation to hold said money as a trust fund, but that in violation of its duty and obligation as such trustee, Fair Corporation caused the said sum to be paid to its Agent in exchange for its promissory notes whereby the Fair Corporation attempted to change and alter the trust relationship between Fair Corporation and Amphitheatre into a debtor and creditor relationship; that even if Amphitheatre consented to the foregoing arrangement it was and is absolutely void under the provisions of the law above quoted which prohibit the waiver of any of the provisions thereof. Fair Corporation denies each and every allegation contained in said Seventh counterclaim.

Section 233 of the New York Real Property Law then in force, now Section 7-103, Paragraphs numbered 1 and 3, of the New York General Obligations Law, provides:

> "Whenever money shall be deposited or advanced on a contract for the use or rental of real property as security for performance of the contract or to

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be applied to payments upon such contract when due, such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same, but may be disposed of as provided in section thirteen hundred and two-a of the penal law. Any provision of such a contract whereby a person who so deposits or advances money waives any provision of this section is absolutely void." Added L. 1935, c. 581; amended L. 1942, c. 628; L. 1943, c. 584; eff. April 17, 1943.

The Fair Corporation's attorney contends that the statutory provision has no application at all because it was not money which was deposited as security, while the trustee's attorney urges that the money which was paid for the notes was in reality the deposit as security. The trustee's attorney then called the Referee's attention to Page 27 of the Judge's opinion which squarely casts the burden upon the trustee in the following language:

"The protection of the law, however, enures only in favor of those standing in the relationships it defines and imposes its obligations and penalties on those whose status is in like fashion established. It does not bar, nor undertake to bring within its operative reach, other relationships, such as arise in respect of loans or purchases to which the landlord and his tenant are parties. The bona fides of the claim that the transaction is extra-statutory

> must subsist, however, if it is to avoid the non-waiver interdict and requirements to segregate, but no presumption aids the one who assumes to impugn a transaction which, read at face, appears to lie beyond the periphery of the statute's definition. The burden is cast upon the one who charges that legal instruments have meanings and effects other than those they express and that their true intent is such as to bring them within the force of the statute.[22] ''

Footnote 22 to the above statement cites cases which the learned Judge described as recognizing ''That in respect to moneys paid by a tenant to his landlord a legal relationship may subsist other than one which presupposes a deposit of security or payment of rent under a lease,'' and the attorney for the Fair Corporation asserts that there is no doubt whatsoever that there can be many forms of security under a lease other than money.

The plain inference from the above quotation is that the Court must determine the intent of the parties to the agreement of lease as modified with respect to the security if it is anything different from a required deposit of World's Fair notes *qua notes.*

At Page 21 of the opinion the learned Judge says:

> ''Subscription was required by FC of Amphitheatre as a condition of its being accepted as a tenant, but the posting of the notes by Amphitheatre as security did not necessarily have the effect of stripping from these instruments every aspect of their origin and function, all their interdependent complex relationships, and FC's commitments for the benefit of all.

> The provisions of the carefully drawn legal documents upon the basis of which more than $30,000,000 was invested in the note issue alone, may not be discriminatorily disregarded at the instance of a single lessee and to the prejudice of all the other subscribers."

This statement would be true if it were so, but, as will be shown hereafter, Amphitheatre was the only tenant in the whole complex of the World's Fair Tenancies which was required to deposit Fair Corporation notes as security. Whether the security transaction was outside the interdict of the statute depends again upon the intent of the parties regardless of the Fair Corporation's transaction with all other subscribers to its notes.

At Page 25 the learned Judge says:

> "The subscription proceeds were to be used by the FC for the communal purposes specified in the Official Statement. Fulfillment of this objective, surely, was the sine qua non that induced Amphitheatre to enter into the lease as tenant."

That statement is true only in the sense that the Producer would not have desired to lease the amphitheatre unless it was assured that there would be a World's Fair with its prospective huge attendance, but it is not true in the sense that the Producer was interested in purchasing Fair Corporation notes to assist the Fair Corporation in fulfilling the purposes specified in its Official Statement or in purchasing the notes as an investment—as was shown by testimony of Mr. Meyer Davis.

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Commenting on the Amphitheatre note to the Fair Corporation by which it promised to pay $150,000 with interest on September 15, 1961, the learned Judge says at Page 25:

> "If the money promised by the subscribers was not paid on schedule, the accruing bills could not have been met except from borrowings by the Fair Corporation elsewhere. Such other loans would, routinely, bear interest. That Amphitheatre was required to pay interest for the period of the extension of time within which to pay the subscription balance is consistent with its status as subscriber. To hold that the requirement for interest as matter of law defines the transaction as the deposit of a cash security by a tenant with its landlord and excludes the alternative hypothesis that it was a loan to a landlord made by a tenant as participant in a joint venture with many others is impermissible without a trial."

There was and has been absolutely no proof that the Fair Corporation discounted Amphitheatre's $150,000 note or pledged it as collateral. The Official Statement clearly shows that the Fair Corporation had borrowed some $30,000,000 to commence its renovation and construction of the World's Fair site, and that this borrowing was to be the first loan repaid with the proceeds from the note subscriptions. Contrary to the implication in the above statement, the Fair Corporation stipulated in the letter agreement to hold the promissory note until it was paid in a special trust account until the earliest date or dates on which moneys may be accepted by the Agent for Fair Corporation's 6% promissory notes. Mr. Rudel paid $150,000 and interest to Fair Corporation over a month

after $25 million of Fair Corporation notes had been subscribed and the note issue validated. It is thus hard to understand why the Judge implies that the payment of interest on this note was consistent with the status of Amphitheatre as a subscriber. The Fair Corporation offered no proof that any other subscriber paid interest on its subscription. It should also be noted that the Fair Corporation did not build the amphitheatre premises for use by the Producer. The amphitheatre had been built and used in the 1939-1940 World's Fair practically in its present condition for Billy Rose's Aquacade.

Prior to the examination of the first witness at the first day of the trial on June 22, 1966, when it was agreed between counsel, in accordance with the Judge's opinion, that the burden was upon the Trustee to show that legal instruments have legal meanings and effects other than those they express. Mr. Doskow offered the Fair Corporation's requests for admissions to which the Trustee had made no response. Trustee's attorney admitted their receipt and that they were not replied to but he asked leave to interpose a denial to request numbered 2C. They were marked in evidence as Fair Corporation's Exhibit A, 6/22/66, (SMP 27). See F. R. C. P. 36. Trustee's motion was granted over objection and he denied request 2C which stated:

> "That in the course of their negotiations the representative of the Fair Corporation did not request or suggest and the representative of the prospective tenant did not offer or suggest a deposit of money as security."

All other matters in the request to admit are deemed admitted except the admission requested under Paragraph 2C.

Trustee's attorney thereby had admitted the genuineness of all letters, documents and agreements listed as exhibits in Paragraph 1 of Fair Corporation's Exhibit A, but he reserved the right to object to their relevancy. He also admitted as facts under Paragraph 2 of Exhibit A that:

> "(a) In the negotiations leading up to the execution of the lease between Fair Corporation and Amphitheatre, Incorporated, conducted between executives and attorneys for Fair Corporation and the principals who later formed Amphitheatre, Incorporated and their attorneys, there was no mention of any statute or provision of law relating to the deposit of security, and specifically no mention of Section 233 of the New York Real Property Law.

And that:

> "(b) In those negotiations the representatives of Fair Corporation initially requested that the tenant post a performance bond, and the deposit of Fair Corporation Notes as security was agreed upon in lieu of such a bond."

The remaining facts which were admitted in (d), (e) and (f) of Paragraph 2 of Exhibit A concern payments by the Agent of interest on World's Fair Notes and one payment on amount of principal.

NOTE: Fair Corporation's Exhibit A, with all the exhibits annexed thereto, was substituted by carbon copy thereof, without exhibits annexed, on June 23, 1966 as Fair Corporation's Exhibit A (SMP 162).

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The request for admissions did not refer to the answering affidavit submitted in connection with this matter by Erwin Witt, Comptroller of the Fair Corporation, sworn to on the 1st day of January 1965, and admitted in evidence without objection as Fair Corporation's Exhibit B on June 22, 1966. (SMP 14). (Mr. Witt had died prior to this trial.)

During the examination of Mr. Samuel Becker, Producer's attorney, about the negotiations which resulted in the execution of the lease agreement, Mr. Witt's affidavit was conceded to be a genuine document. It outlined quite accurately what took place at these negotiations. It stated that Mr. Witt had been responsible for the receipt and treatment of the security under the lease and that he was fully familiar with all of the facts relating thereto.

Formal negotiations commenced with a letter dated February 2, 1961, addressed by Samuel Becker, for the Producer, to Judge Rosenman as counsel for the World's Fair Corporation (Trustee's Exhibit 1, 6/22/66). It submitted a general proposition on behalf of a corporation to be formed by Meyer Davis and Leon Leonidoff to lease the Amphitheatre at the World's Fair for the two years, 1964 and 1965; and as rental it would pay certain percentages of receipts from admissions and concessions therein enumerated and it would guarantee a minimum rental of $500,000 for the two years. Also submitted was a certified check for $50,000 representing ten per cent of the minimum rental, which was to be applied to the first rental due under the lease.

It offered to expend a sum not to exceed $65,000 which had been estimated by the Fair Corporation as necessary for reconditioning painting and repairing the building, and "in the event that the costs should exceed such amount,

we would expect the World's Fair Corporation to pay such excess.

The letter also said:

> "Satisfactory assurances of the performance of the agreement and adequate financial responsibility will be furnished."

A description of personnel contained in the letter stated that the shows would be produced and directed by Mr. Leon Leonidoff who has been the senior director of Radio City Music Hall, New York City, for over thirty years, and that the Amphitheatre would be graced by Meyer Davis' Orchestra; that Meyer Davis operates his organization on a nation-wide basis with offices in New York, Washington, Philadelphia, Newport, Southampton and Palm Beach, and supplies music at the most exclusive social functions held in the United States and abroad, in leading resorts and hotels, aboard the luxury liners and at many Broadway shows; that he had made thirty-one White House appearances, six Inaugural Balls, including that of President Kennedy.

The letter also stated that the treasurer and financial principal will be Thomas R. Rudel, Chairman and President of Rudel Machinery Company. That Mr. Rudel would arrange for the complete financing of the operation and will supply to the Fair Corporation adequate guarantee that provisions of the lease will be fully carried out.

The estimated costs and receipts of the proposed Amphitheatre operation are set forth and the production of a fantasia spectacular was planned with a fabulous water sequence, and the letter closed by requesting the conclusion of arrangements for leasing the Amphitheatre as soon as

possible. It seems obvious from Trustee's Exhibit 1 that there could have been some informal discussions before the letter was written.

Trustee's Exhibit 2 of June 22, 1966, is a letter by Stuart Constable, Vice President of Fair Corporation, to Mr. Preusse of Whitman, Ransom & Coulson, Esqs., transmitting correspondence in connection with nine separate proposals for leasing the Amphitheatre and stated:

> "In our opinion the only proposal offering a basis for negotiation of a satisfactory agreement is the one made by Samuel Becker on behalf of Messrs. Rudel, Davis and Leonidoff.
>
> "We recommend that the President be authorized to negotiate and conclude an agreement for the lease of the Flushing Meadow Amphitheatre with this organization."

The major terms of the proposed lease were discussed at a meeting held at the office of the Fair Corporation's attorneys on March 13, 1961. Mr. Witt's affidavit, Paragraph 3 states:

> "That meeting was attended by the principals of the proposed lessor, Messrs. Meyer Davis, Leon Leonidoff and Thomas R. Rudel, and their attorneys; and by Stuart Constable, Vice-President, William Kane, Director of Concessions and me for the Fair Corporation, and our attorneys. Our discussions were based on an outline or checklist setting forth the terms of the proposed lease which had been prepared by the attorneys for the Fair Corporation."

The affidavit then accurately quotes paragraph 11 of the outline or check list. The check list has a symbol at the top

of the first page "HW/SW, 3/13/61" and in writing it says "Check-list used at meeting on 3/13/61 with Amph people." HW was Harold Weinstein, associated with the firm of attorneys who represent the Fair Corporation. This check list consisting of eleven typewritten pages, is a quite complete resume of the provisions of the lease to be negotiated, and most, if not all, of its provisions were incorporated in the final lease. Paragraph 11, which relates to security states:

> "Performance Bond—Upon the execution of the lease the Producer shall deliver to the Fair Corporation a performance bond in the principal sum of $750,000 conditioned upon the full, faithful and prompt performance of, and compliance with, on the part of the Producer, all the covenants, terms and conditions of the lease on the Producer's part to be performed. The bond shall be in form satisfactory to the Fair Corporation and shall be made by a surety company doing business in the State of New York satisfactory to the Fair Corporation."

Mr. Becker, on behalf of the Producer, made notes at the conference (Trustee's Exhibit 5, 6/22/66), both the face and the back of a yellow sheet. The face is dated 3/12/61. It was agreed that he dated this in error and that it should have referred to March 13, 1961. The back of the yellow sheet is dated 3/22/61 and contains notes respecting a further conference. It shows that at the March 13th "Conf. Re AQuacade" there were present: Rosenman, Kaye, Weinstein, Constable, Kane and Witt for the Fair and Becker, Stern, Davis, Leonidoff and Rudel for Davis et al.

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Paragraph 5 of the outline pertained to rent which shall be based upon the gross receipts of the Producer from admissions, concessions and any and all other charges made by the Producer.

> "Each year shall be considered separately. There will be a minimum rent of $500,000 of which $250,000 will be payable on the signing of the lease and the remaining $250,000 will be payable on July 1, 1963."

Becker's note on this paragraph said:

> "The Fair wants to obtain about 1 million dollars. Percentage rates should not apply to receipts from concessionaires. They propose 50% of our receipts (Appt. 3 P.M. Mar 21 at this office)."

In his notes concerning Paragraph 11 Becker says:

> "11. Willing to accept $600,000 Fair notes instead of $750,000."

Weinstein's check list has a handwritten notation opposite Paragraph 11:

> "Would take $600,000 in notes of the Fair as security."

Mr. Becker did not remember whether anyone at that meeting suggested a purchase of $750,000 in World's Fair Notes instead of the $750,000 performance bond mentioned in Paragraph 11 of the check list. The notations on Trustee's Exhibit 5 were made at the time of the conference but Becker did not have a present recollection of who suggested the changes although he did testify that he remonstrated and said that:

> "* * * I felt that with an advance deposit on the rent and if the Fair was satisfied with Mr. Rudel's

> credit, that his personal guarantee on the lease ought to be sufficient.
>
> "I objected on being compelled or being asked to put up a bond, because I stated that a bond of this kind wold (sic) require cash collateral, and that mean (sic) that my clients had to put up $750,000 in cash."

He also said he would advise his clients to refuse to put up such bond (SMP 88).

The statement in Mr. Witt's affidavit (Fair's Exhibit B) at the end of Paragraph 3 concerning the statement allegedly prepared by Mr. Constable of the discussion regarding the performance bond at that meeting viz:

> "Becker questioned the need for his clients to furnish a Performance Bond, the cost of which is very high. Mr. Witt stated that in lieu of this Bond, he would be willing to accept $750,000 worth of Fair Corporation's notes as security under the lease. We would hold the notes in escrow and they would receive the interest, provided they were not in default."

did not refresh Mr. Becker's recollection. On the reverse side of Trustee's Exhibit 5, were notes Mr. Becker made at the meeting held on March 22, 1961. These notations were about rent payments and did not relate to security (SMP 94-95).

The final draft of the lease agreement (Trustee's Exhibit 6, 6/22/66) provided that the minimum rent of $500,000 for the term was payable: $100,000 on the execution of the lease, $150,000 on April 1, 1963, and $250,000 on December 1, 1964.

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Mr. Becker was then referred to Paragraph Forty-first of the lease agreement that required $250,000 of Fair Notes as security, and questioned by Mr. Adelman as follows:

"Now, between the time you made these notes and May 5th (the date as of which the lease was executed) did you receive any information that this was the amount of notes which Amphitheatre, Inc. would purchase?

"A. It was arrived at by negotiation at the meeting on the 22nd of March.

"Q. And were you there when it was arrived at?
"A. Yes, sir; I was.

"Q. Who at that meeting said that they were willing to accept $250,000 in notes? A. I have no notes as to who was present on that occasion, but I do have a recollection of what occurred at that time.

* * *

"A. My best recollection of what occurred at that time is, that after we declined to put up a bond or to buy no . that amount, ($600,000) we came back to a meeting.

At that second meeting we again had a discussion. I do not recall who was present at that time, but I know that this discussion and the conclusion of the $250,000 of notes came about as a result of negotiations that we had at that meeting, where I kept insisting that we couldn't put up any bond and we couldn't buy notes, and we couldn't be asked to do anything more than give Mr. Rudel's personal guarantee in addition to the advance deposit.

In the course of that discussion the Fair people who were present, and I do not recall exactly who

was there, but my best recollection tells me that at least Mr. Witt was there, and I don't know who else was there for the Fair—that in the course of these discussions we finally came down to where my recollection is that we agreed finally to put up $250,000 in cash.

Then I believe again according to my best recollection that Mr. Witt suggested, 'While you didn't need to put up the cash, you could put it up in Fair notes' " (SMP 102, 103, 104).

There were several galley proofs of the lease agreement; the first one was made about April 8, 1961, the next galley proof was April 15, 1961, and the third galley proof was April 18, 1961. In each of these galley proofs Paragraph Forty-first of the lease contained a provision for a deposit of $250,000 in World's Fair notes as security, and in all of these drafts the notes were to be deposited "upon the execution of the lease," but in the April 27th, 1961 galley proof of the lease, and in the final lease as signed, Paragraph Forty-first required a deposit of the notes "within sixty days after the execution of this lease" (SMP 107, 108).

Mr. Rudel's guarantee of performance was a printed part of the lease agreement which it is conceded that he signed. It was stipulated that in the original draft or galley proof of April 8th, and in the other earlier drafts or galley proofs there was a form of guarantee without any limit; that in the galley proof of April 27, 1961, the guarantee appeared for the first time to have a limit of $650,000 (SMP 112).

On cross-examination the Fair's attorney read part of Mr. Witt's affidavit to Mr. Becker where it stated:

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"Q. . . . 'In the negotiations regarding the security provision of the lease, there was no mention of the consideration of the statute—' and that is the New York Real Property Law—'at no time durnig those negotiations was it proposed or suggested by either party that money might be deposited as security.'

"Does your recollection differ from that? A. Yes, Sir" (SMP 115).

Mr. Becker did not claim that Mr. Witt was wrong or that he had any superior recollection, but he insisted that his recollection differed from that statement by Mr. Witt.

"A. My best recollection is that we proposed to put up or they asked for cash, and we proposed to put up cash, and Mr. Witt suggested the purchase of bonds instead. That is my best recollection, Mr. Doskow.

"Q. And is it your recollection that that agreement was reached at a meeting? A. That is my best recollection; yes sir.

* * *

"The Referee: Is it your recollection that the offer by the group which was going to enter into this lease with the Fair Corporation offered to deposit cash security?

"The Witness: It is my recollection that we finally were—that in the negotiations we finally agreed to put up a deposit of $250,000.

It is my recollection that we agreed to put it up in cash, and it is my recollection, my best recollection, that Mr. Witt suggested that we did not need to put it up in cash, but that we could buy Fair notes and put it up in Fair notes instead" (SMP 116, 117).

* * *

"Q. Mr. Becker, were you aware or were you familiar with the New York Statute relating to the deposit of money as security under a lease? A. I know that there is such a statute.

"Q. And you knew it at the time you were engaged in these negotiations, did you not? A. I believe so; yes.

"Q. Did your clients express any objection to the investment in the World's Fair notes as security under this lease? A. I don't think so" (SMP 120).

* * *

By the Referee:

"Q. What was the purpose if you remember for paying $250,000 either as a cash payment to the Fair or for the purposes (sic*) of the notes? What was the object of that? A. Additional security or additional collateral for their commitment.

"Q. Was it made in relation to a lease? A. Yes, sir. It was made in relation to the lease which eventuated, and my recollection is that it was the best we could get instead of a performance bond" (SMP 122).

Mr. Becker was further questioned as follows:

"Now in the course of these negotiations did you do as he suggested (referring to Meyer Davis's memorandum to Becker (Fair's Exhibit C, 6/22/66)) and try to get Mr. Rudel's guarantee eliminated from the lease? A. I don't think so, but I don't remember.

"Q. Have you any recollection of having suggested a course that would save face? A. No, sir. I may say in passing that I doubt very much that the Fair would have found it acceptable to eliminate

---

* "Purchases" was probably used here.

Mr. Rudel, because it was a fundamental assumption of our negotiations that somebody with some credit would sign a document here.

"Q. And it was a fundamental effort on your part to try to avoid any additional security under the lease; is that correct? A. My effort was to cut down the obligations or cash commitments to the utmost.

"Q. When the purchase of Fair Corporation notes was suggested, did it ever occur to you, Mr. Becker, that that would violate the New York Statute? A. No, sir" (SMP 135, 136).

Becker stated that he believed that a guarantee is not security under a lease to which the New York Statute refers. The Referee then asked Mr. Becker:

"If that is so then was it the intention of the group that you represented to pay $250,000 for World's Fair notes as an investment, or was that to secure the performance under the lease?

"A. My best recollection and belief is the latter.

"Q. And by 'the latter' what do you mean? A. To secure the performance of the lease.

"Q. Could you characterize that as security under the lease? A. I believe that was its purpose; yes, sir" (SMP 141).

Becker said that he had read Paragraph Forty-first of the lease before it was executed, and the Trustee's attorney then asked:

"Q. Was it ever intimated to you that if you paid the World's Fair cash of $250,000 to the Fair Corporation that that money or the security would have to be deposited as a trust fund pursuant to the statute of the State of New York, Mr. Becker? A.

There was never any discussion of it, sir.

> "Q. And that if you purchased notes then the purchase price of the notes would be immediately available for use by the Fair Corporation? A. There was never any such discussion."
>
> • • •
>
> "Q. So that it is your statement, then, that this $250,000 was not intended as a naked purchase of World's Fair notes for the purposes of investment? A. My best recollection, your Honor, is that this provision, Section 41 of the lease, was an outgrowth of the request for a performance bond, which was finally reduced to the amount of $250,000, which was to be put up as collateral.
>
> My best recollection is that it was agreed finally to put that up in cash, and then Mr. Witt my best recollection is, suggested that it need not be put up in cash, but that the cash could be invested in World's Fair notes, and the World's Fair notes could be put up as collateral" (SMP 142, 143).

It is also shown that the amount of security requested was reduced to $250,000 about a month before Mr. Rudel's obligation was limited to $650,000 by the draft of April 27, 1961. Mr. Becker was also asked if he was told at any time by any one that unless Amphitheatre agreed to purchase $250,000 in notes of the World's Fair they would not get this lease of the Amphitheatre, and he answered, "No, sir" (SMP 147).

Meyer Davis was called by the Trustee and testified that a good friend, one Thomas Deegan, and his associates were working on the idea of a New York World's Fair and told

him about it sometime prior to 1960. Deegan was President of the World's Fair Corporation and then became a member of the Executive Committee when he relinquished his office to Mr. Moses. He was advised to contact Judge Rosenman who had been placed in charge of the so-called "Lake Amusement Area" in which the Amphitheatre was located. He then discussed with Judge Rosenman his offer to take over the entire amusement area and make a complex of it on the same order as the Tivoli Gardens in Copenhagen, Denmark, but because of the large investment required the Davis group would have to have a lease for twenty-five years, so that project was rejected. Shortly thereafter he was told that the maximum lease which could be obtained for the Amphitheatre was two years, and that at the time of these early discussions, a lease of the Amphitheatre would be subject to the World's Fair Corporation obtaining a lease to it from New York City. This he considered a mere technicality and in February of 1961 his attorneys submitted a proposal to lease the Amphitheatre to Judge Rosenman's office. Mr. Davis then identified the letter written by Samuel Becker to Judge Rosenman under date of February 2, 1961 (Trustee's Exhibit 1, 6/22/66); and when he was informed that there was a meeting at Judge Rosenman's office on March 13, 1961 he said that his proposal was considered at that meeting but it was not accepted as submitted. He testified concerning the discussions at that meeting as follows:

> "Our offer of a satisfactory guarantee, assurance of guarantee, was that the signature of Mr. Rudel, one of our three people involved, was a sufficient guarantee of the lease.
>
> "The World's Fair people did not accept this, and they talked and insisted and were very vehement

about putting up a bond amounting to $750,000 or a million dollars, to which we just as strongly objected.

"There was considerable dickering. Then the original World's Fair demand was reduced to $600,000, which we also rejected. It finally got down to the point where we agreed to deposit $250,000 as a guarantee of the lease, with Mr. Rudel's signature to take up any additional amount that would be necessary, if it was necessary. We had no intention of buying any bonds.

• • •

"After considerable discussion Mr. Witt suggested that if we changed the type of the security from cash to buying notes, he would be in favor of it, and as an inducement to have us——

• • • •

"To change the type of security from cash to notes, which would be very advantageous to them, because as the first exhibitors in the amusement area, and having negotiated or having entered into a lease if the negotiations were successful with the most prominent and important amusement in the area the fact that we had bought notes would be of great value to them in selling additional notes to various and sundry other people, particularly the exhibitors who were also coming into the amusement area.

"In other words, it would be a lever, possibly, or something that they could use in inducing other exhibitors to buy notes of the World's Fair.

"We finally agreed to that" (SMP 53, 54, 55).

At SMP 57 the witness continued:

> "Mr. Witt strongly intimated or stated that if we bought the bonds instead of putting up the cash——
>
> "Q. Did he intimate it or did he say it? A. He said it.
>
> • • •
>
> "A. He said that it would be a very potent influence on our securing the lease, including our concluding negotiations satisfactorily."

Paragraph 11 of the check list (Trustee's Exhibit 3, 6/22/66) was read to Mr. Davis but he did not recollect having seen a copy of it. Mr. Davis remembered that Mr. Witt was at the meeting; he did not remember exactly what Witt said but he did remember that the figure for the performance bond was reduced to $600,000 and that was also rejected. Davis thought that the suggestion that they put up a performance bond for $600,000 or that they purchase World's Fair bonds for $600,000 was interchangeable. Eventually they did purchase $250,000 worth of notes and he said:

> "I only know that we rejected the first offer and it finally came down to where we offered to deposit $250,000 in cash" (SMP 71).

He said there were quite a few meetings and there were conversations with representatives of the World's Fair Corporation either on the telephone or face to face outside of the general meetings with Mr. Witt, Mr. Constable and Mr. Weinstein and with Judge Rosenman (SMP 73).

Mr. Davis knew that the World's Fair was to be financed by the sale of notes to the public, or institutions, to ex-

hibitors and to lessees, and that a large amount was contributed by the City (City of New York); and that they were offered pretty generally to anyone at the Fair that they thought might be interested. He assumed that these persons included exhibitors and tenants but he really did not know.

> "Q. Is it your recollection that you were told by anyone connected with the Fair corporation that you could not get this lease unless you purchased notes? A. I wouldn't put it that strongly. It was intimated that it would be very helpful in our securing the lease if notes were purchased" (SMP 167).

He said that the intimation came from Mr. Witt and that Mr. Witt told him he thought that this would be a big help to the Fair in selling notes to others.

The Fair Corporation's attorney offered in evidence Fair's Exhibits D, E and F. D was letter of June 15, 1961 from Mr. Witt to Meyer Davis enclosing the Official Statement, the Subscription Agreement and the Subscription form; E was the Subscription Form, and F was the Official Statement which was offered in evidence specifically omitting the rubber stamp notations which appear at Page 2 on that exhibit because these rubber stamp notations referred to amendments of the Official Statement which took effect on August 1, 1961, and on September 3, 1963, both being subsequent to the date of the Subscription Agreement, which was June 21, 1961.

Davis admitted signing the subscription, and that he must have read the Official Statement and presumably the Subscription Agreement which was referred to in the subscription. He understood that the subscription was a

contract by Amphitheatre, Inc. to buy $250,000 worth of notes, but the actual payment was made by Mr. Rudel who was subsequently reimbursed by Amphitheatre (SMP 186). Mr. Davis recalled writing the memorandum to Mr. Becker and to Mr. Stern, marked Fair's Exhibit C, but it did not refresh his recollection that he tried to get Mr. Rudel off his personal guarantee entirely:

> "A. My only comment in that was to object to the Fair requiring or suggesting or wishing a $750,000 bond" (SMP 190).

He also recalled having written (Fair's Exhibit H, 6/22/66) a memorandum dated March 24, 1961, to his attorneys, Harold Stern and Samuel Becker, in which he suggested that they endeavor to limit certain payments and relieve Mr. Rudel from putting in more than is necessary at the start.

Then part of Paragraph B of Mr. Witt's affidavit of February 1, 1965 (Fair's Exhibit B) was read to Mr. Davis as follows:

> "At no time during those negotiations was it proposed or suggested by either party that money might be deposited as security. To the contrary, the only alternative to the deposit of Fair Corporation notes which was considered at any time was the posting of a surety company performance bond" (SMP 192).

and he was asked if these statements are wrong:

> "A. I would say that Mr. Witt is mistaken.
>
> "Q. And you are confident that your clear recollection is to the contrary? A. It is, yes" (SMP 193).

Decision

This matter was followed up on redirect examination and he was asked by Mr. Adelman:

> "Q. If you had not been negotiating a lease with the Fair Corporation would you, Mr. Leonidoff and Mr. Rudel had [sic] made an investment in this Fair Corporation of $250,000, Mr. Davis? A. No, absolutely no.
>
> "Q. Did you consider it to be a good investment? A. I did not" (SMP 194, 195).

Over the Fair Corporation's objection Mr. Davis stated:

> "A. In my opinion the World's Fair was just another form of show business, which according to my experience—and I have been mixed up in show business over many years both as an investor and as a producer and practically in every form of show business—I consider show business a gamble and a very risky gamble.
>
> "I also know something about the record of past world's fairs, which have been rather disastrous" (SMP 195).

When Mr. Davis filled in the subscription he wrote under his signature, "in accordance with agreement of May 5, 1961" (lease agreement) and he was sure that he had the advice of counsel when he filled it in.

> "Q. Now, what did you intend to mean by that, Mr. Davis? A. I intended it to mean that this subscription was in accordance with the paragraph of the lease which called for us to purchase these bonds or notes.

• • •

"Q. Would you have subscribed for $250,000 of notes of the Fair Corporation, Mr. Davis, absent the requirement in the lease? A. No, absolutely no" (SMP 203)

He then testified that the amphitheatre was an existing building which the Fair Corporation did not have to build and that it had been there from the last World's Fair. It required very substantial renovation and repairs before the Producer could use it, and because of its condition it was agreed in the lease that Amphitheatre was to contribute $65,000 or $70,000 and the Fair Corporation was to contribute the rest of the money toward that.

Following the examination of Mr. Becker and Mr. Davis the Trustee rested. Mr. Howard Weinstein was called and examined by the Fair Corporation's attorney on July 19, 1966. Some of his testimony may be summarized as follows:

Mr. Howard Weinstein, presently associate general counsel to the Tishman Realty and Construction Co., Inc. had been associated with the firm of Rosenman, Colin, Kaye, Petschek & Freund from July 1952 to January 31, 1964. From early March of 1961 he was engaged in the preparation of a lease between the World's Fair Corporation and the tenant of the Amphitheatre property. For the purpose of a meeting between the parties he had prepared Trustee's Exhibit No. 3, sometimes referred to as a check list, which set forth the terms that the World's Fair Corporation desired to incorporate in the lease.

The first meeting was held on March 13, 1961. Appearing for the Fair Corporation were Stuart Constable, Irwin Witt and William Kane; and their attorneys present were

Judge Rosenman, Mr. Sidney Kaye and Mr. Weinstein. For the tenant were Mr. Meyer Davis and Mr. Leon Leonidoff; and their attorneys Mr. Harold Stern and Mr. Samuel Becker. The conference lasted some three hours. Paragraph 11 of the check list was entitled "Performance bond". The Producer's attorneys, either Mr. Stern or Mr. Becker, stated at the conference they did not wish to post the $750,000 performance bond under the proposed lease. Mr. Witt stated at that time that if the tenant objected to posting the performance bond that the Fair would accept a deposit of World's Fair notes in the amount of $600,000. This proposal was not accepted. The witness could not give the reason for dropping from $750,000 to $600,000.

There was a second meeting with Mr. Weinstein attending which was held on March 21, 1961 in Judge Rosenman's office at which the same people were present. Mr. Weinstein testified that there was a discussion of the amount of notes to be posted:

> "Mr. Witt still wanted the $600,000, and the Amphitheatre people wanted a lesser amount or they wanted to post a lesser amount, rather."

He said that at that meeting:

> "Except for the unconditional guarantee by Mr. Rudel, which was also part of the lease, there was no other form of security discussed or suggested by either of the parties.
>
> "Q. At the March 21, 1961 meeting was the discussion in terms of a performance bond, or wasn't that still being discussed. A. No, it was not.

Decision

"Q. What was the form of the security that was discussed then? A. It was to be World's Fair notes, and the difference between the parties was the amount, the principal amount" (SMP 227-228).

After that meeting Mr. Kaye addressed a memorandum to Mr. Weinstein, dated March 23, 1961 (Fair Exhibit I, 7/19/66) (SMP 229), advising him that Mr. Rudel had agreed to buy $250,000 worth of Fair notes, and had requested that the last fixed rental payment of $200,000 due in April of 1964 be postponed until November of 196[redacted]nd that the Fair Corporation rely on his personal guarantee for this sum. (See also SMP 286).

Mr. Weinstein said one of the methods of raising capital for the Fair Corporation was the sale of up to 40 million dollars in World's Fair promissory notes. When he was asked if the sale of notes was discussed at either of the aforesaid meetings he said it was, and:

"I believe that the March 13th meeting and certainly at the March 21st meeting Irwin Witt stated that they were very interested in obtaining subscriptions, so that they could meet the minimum requirements for the issuance of World's Fair notes, and they were also interested in showing to the other purchasers of notes that those who were primarily interested in the Fair, such as the concessionaires, had enough interest in the Fair to purchase World's Fair notes" (SMP 231).

He said that he did not hear Mr. Davis, Mr. Becker or Mr. Stern say anything about the purchase of notes.

He prepared all of the several drafts of the lease and the final draft that was signed on May 5, 1961. He also

prepared the letter agreement to amend Article 41 of the lease in connection with the deposit of the World's Fair notes as security (Fair Exhibit J), and he testified that the amendment was prepared as a result of discussions with Mr. Kaye.

> "... There was no conference about the amendment, but there were discussions over the telephone as to the form of agreement" (SMP 234).

He also testified that the subscription which was signed by Mr. Davis for Amphitheatre (Fair Exhibit E) referred to the subscription agreement which is Fair Corporation Exhibit G for identification. (Fair Exhibit G was then received in evidence 7/19/66 at SMP 239).

The letter agreement of July 10, 1961 prepared by Mr. Weinstein was marked in evidence as Fair Exhibit J, 7/19/66 (SMP 239).

Annexed to Fair Exhibit G is a document headed "Amendatory Agreement No. 3." Trustee's attorney, Mr. Adelman, objected to its introduction in evidence because it was made subsequent to the date of the subscription and the letter agreement. When asked what the effect of amendment No. 3 was, Mr. Adelman said:

> "It is very simple, your Honor. Under the subscription agreement all Amphitheatre had to do was to pay $100,000 upon the subscription, $50,000 in 1962, $50,000 in 1963 and $50,000 in 1964.
>
> "However, they could not wait. So, they amended it so that they should pay the whole $250,000 at once. That was the effect of it, so that the subscriber could if it wanted to pay the full amount at once" (SMP 248).

Decision

The point of Mr. Adelman's objection was that there was no proof that the amendatory agreement was binding on the subscribers to the notes. It required the agreement or the consent of 66 and two thirds percent of the note holders. Another ground to the objection was that the amendment did not take effect until August 1, 1961, nearly a month and one half after the subscription was signed, because the subscription which incorporated the subscription agreement by reference provided when it was signed by Amphitheatre for four payments as above stated. (The amendatory agreement No. 3 was then marked Fair Corporation Exhibit K for identification, 7/19/66 SMP 256).

The amendment gave the subscriber the option to accelerate payments. By reason of the Amendatory Agreement No. 3 and the letter agreement (Fair Exhibit J) the Fair Corporation, which held Amphitheatre's promissory note for $150,000 in escrow pending the adoption of Amendatory Agreement No. 3, (and pending the subscription of at least 25 million in World's Fair notes which would make the subscription binding on the subscriber to purchase the notes) could make one payment in full in the name of Amphitheatre and have the notes held by the Fair as security under the lease.

Mr. Weinstein testified that the first time he gave any consideration to the application of Section 233 of the Real Property Law to the Amphitheatre lease was in December of 1964 when he attended the Christmas luncheon for the Rosenman firm and he (presumably Judge Rosenman) advised Mr. Weinstein that the Trustee had attacked the deposit and was claiming that there was something wrong with the provisions of the lease (SMP 258).

"Q. Prior to that time did you know about that claim? A. No, I did not.

Decision

"Q. Did you give any thought before then to the possibility that this section, section 233 of the Real Property Law applied to this lease, Mr. Weinstein? A. I had given no thought to it" (SMP 259).

On cross-examination Mr. Weinstein was asked about the memorandum of March 31, 1961 (Fair Exhibit I) which advised him that Mr. Rudel had offered to purchase $250,000 worth of World's Fair notes and if he knew then of the second prospectus or offering statement of the World's Fair dated April 10, 1961 (Fair Exhibit F) which concerned the 40 million issue of World's Fair notes because the previous official statement of December 1960 had been concerned with an offering of notes aggregating $67,500,000. Mr. Weinstein said:

"I think I can best answer that, your Honor, by pointing out that the March meetings the discussions of the purchase of the World's Fair notes for the 40 million dollar issue, the one that came out under the offering statement of April 10, 1961—and Mr. Witt was talking about it because that is the one that was going to go into existence or into effect—I had never seen this offering statement before, and when I received the documents, the subscription agreements, I recived them in the latter part of April, and they were for the 40 million dollar issue.

"That was the issue which was discussed as the security which would be deposited. In other words, it would be $250,000 of the 40 million dollar issue, and the reason for that is that Mr. Witt stated that at that time they would be so set up that they would have to get the 25 million dollars out of the 40 million dollars by a certain date, and therefore, he was trying

to have the people buy notes in order to accumulate the 25 million dollars'' (SMP 265, 266).

Then it was stated that the $67,500,000 note issue had been abandoned and thus not relevant to this proceeding.

Mr. Weinstein prepared his check list on March 12, 1961, the day before the first meeting. Before he prepared this check list he was shown the letter written by Mr. Becker to Judge Rosenman (Trustee's Exhibit 1) which offered ''satisfactory assurance of the performance of the agreement, (lease) and adequate financial responsibility will be furnished''.

''Q. What did you prepare in connection with the satisfactory assurances that you wanted, Mr. Weinstein?, Was this your item No. 11? Is that what you prepared, Mr. Weinstein?

''A. Well, I prepared item No. 11, but it was not in response to anything in the letter. It was in response to what I thought Judge Rosenman thought the Fair should have in connection with this list for what was to be leased to the tenant'' (SMP 274, 275).

He said that he discussed Item No. 11 with Judge Rosenman, that nothing in the check list refers to Mr. Rudel's personal guarantee, that Item No. 11 speaks only about a $750,000 performance bond, and that Mr. Becker or Mr. Stern said they had checked the cost of obtaining such a bond and found the premium to be very high and they did not wish or want to purchase the bond and spend the money, but they made no other alternative proposal.

''Q. Didn't Mr. Becker state that you would get Mr. Rudel's guarantee, his personal guarantee, which

would be satisfactory, and that he would give you a financial statement of Mr. Rudel; and wasn't that the only form of security that was offered to the World's Fair?

"A. He may have said, and that was always in the transaction, that Mr. Rudel would give an unconditional or no limited guarantee of performance by the tenant, but that was not in lieu of the security requested under Item No. 11" (SMP 276, 277).

Mr. Witt's affidavit stated that in lieu of a performance bond he would be willing to accept $750,000 worth of Fair Corporation notes as security under the lease. When Mr. Weinstein referred to this part of Mr. Witt's affidavit he said:

"My recollection is that he mentioned the $600,000 figure at the March 13, 1961 meeting" (SMP 280).

Mr. Weinstein's recollection was based on marginal notations that he had made on the check list. However, Mr. Becker and Mr. Stern did not agree to that suggestion. Mr. Weinstein said:

"At the March 21st meeting they had been dickering as to the amount of notes to be put up, and at the March 21st meeting they wanted to put up a lesser amount of notes, and the exact amount of notes to be put up was not resolved at the March 21, 1961 meeting, either" (SMP 283).

At SMP 284 Mr. Weinstein said:

"Mr. Witt indicated at the March 21, 1961 meeting that he would accept a lesser amount of notes.

"Q. To whom did he say it, and how much less than $600,000 in World's Fair notes would he accept?

Decision

"A. It was said at the March 21, 1961 meeting at which were present the same people as I testified to before. I don't recall the exact amount or lesser amount he was willing to accept. It was not acceptable in amount to the Amphitheatre people, and the meeting was adjourned without reaching an agreement as to the amount of the notes."

Mr. Kaye's memorandum of March 25, 1961 (Fair Exhibit I) advised him the amount of $250,000 had been arrived at after the March 21st meeting (SMP 285).

When the Referee suggested to the witness that the Trustee was interested in finding out how all of a sudden the Fair's request goes down from $600,000 to $250,000, Mr. Weinstein said:

". . . My notes show that the $600,000 was offered on March 13, 1961. Then there was a period from March 13, 1961 to March 21, 1961 for the people to think about it.

"Then at the meeting of March 21, 1961, I don't remember the exact amounts that were mentioned, but I know it was subject to a great deal of discussion as to amounts, and I know that Mr. Witt's prime concern at that time was to obtain subscribers of World's Fair notes to show that the exhibitors were interested in and had faith in the World's Fair.

"Secondly, in order to have subscriptions to meet the 25 million dollars which had to be met some months hence which was in the offering he was very interested in obtaining those subscriptions" (SMP 289).

Mr. Weinstein's testimony about the several drafts of the lease was similar to Mr. Becker's testimony about them. The first galley proof submitted was the second draft of the lease and Paragraph Forty-first provided for the deposit of $250,000 worth of World's Fair notes upon the execution of the lease. That draft and the rest of the drafts provided for the same kind and amount of security and all were prepared before he saw the official statement dated April 10, 1961. The first galley proof is dated April 8, 1961 (SMP 321) and was delivered on April 8th. The next galley proof is dated April 15, 1961. The next galley proof is dated April 18th. In these three drafts paragraph Fifth-B is the same. Paragraph Forty-first is the same and the guarantee is unlimited. The next galley proof is marked "Proof of April 27, 1961." (It was also referred to as the proof of April 28, 1961.) Here the rent was changed in Paragraph Fifth-B so that the minimum of $500,000 for the term is payable $100,000 on execution, $150,000 on April 1, 1963 instead of $200,000, and $250,000 on December 1, 1964 instead of $200,000 on April 1, 1964, and paragraph forty-first provides for the first time for the deposit of the notes as security within sixty days after the execution of the lease by the Producer and delivery thereof to the Fair Corporation (SMP 328) and the guarantee is now limited to $650,000 (SMP 329).

Upon cross-examination Mr. Weinstein was asked:

> ". . . You also knew that it required some time in the middle of June or July until a minimum requirement of 25 million dollars was subscribed for. So, how could you possibly have prepared a lease which

required the deposit of these notes upon the execution of the lease?

"A. Well, you will find that between this draft and the final lease that was signed on May 5, 1961 a change in the language of the 41st paragraph to permit the deposit of these notes to a date 60 days after the execution and delivery of the lease.

"That was a result of negotiations by the Amphitheatre people wanting additional time. . . . it was the latter part of April after this draft was prepared and before we were ready to sign the final lease when it was realized and I think I pointed it out because I received the subscription agreement that I identified previously, that I pointed out for the first time when it came to my knowledge and I think the realization that under the terms of the subscription agreement the trustee, the Chase Manhattan Bank, couldn't permit a subscriber to pay for all of his notes all at once, and it was to avoid a default under the lease which required the notes to be put up within 60 days after it was signed, in May or June or July, that we entered into the amendatory agreement for two purposes.

"One was to permit them to deposit moneys to pay for the notes, but the notes would not be delivered until a latter date.

"The Referee: And are you now talking about amendment No. 3?

"The Witness: That is right; and then at the same time we proceeded to amend the subscription agreement to permit a subscriber to pay for all of

his notes at one time, and get all of his notes if he so wished.

"Mr. Doskow: That was amendment No. 3, was it not?

"The Witness: Yes, that was amendment No. 3; and the first one was the July 10th letter agreement. Amendment No. 3 was adopted in order to permit the Amphitheatre to pay for all of its notes, and to permit the Chase Manhattan Bank to accept all the money and to issue all the notes so that Amphitheatre could obtain possession of these notes, and deposit them under the agreement, so as not to be in default under the agreement" (SMP 298, 299, 300).

Mr. Weinstein also testified as follows:

"With respect to the change permitting a sixty day period before the World's Fair notes had to be deposited, that was also requested by the Amphitheatre people——

"The Referee (interposing) You said that you found out after looking at the draft that it could not be paid upon its execution until the notes would be subscribed and approved for delivery by the Agent.

"The Witness: Your Honor, the request for the sixty day delay came from the Amphitheatre people.

"The Referee: How much delay would you need if you did not know when the subscription would be authorized?

"The Witness: We would have needed longer than sixty days.

Decision

"The Referee: Then, why did you limit it to sixty days?

"The Witness: At the time the sixty-day proposal was made by the Amphitheatre people—and these drafts which came from Mr. Stern's file show on two of them that he had marked '60 days' on both the April 18th and the April 15th drafts, you have '60 days' alongside of them——

"The Referee (interposing) Well, did he know that twenty-five million dollars would be subscribed within that time?

"The Witness: No, he didn't know that.

"The Referee: Well then, who set the sixty days?

"Mr. Doskow: May I call your Honor's attention to Fair Corporation Exhibit D which is in evidence?

"The Referee: What is the date of it?

"Mr. Doskow: The date is June 15, 1961.

"The Referee: Then, that is after this.

"Mr. Doskow: But it has the statement in a letter to Meyer Davis from Mr. Witt that 'Tom Rudel requested that we defer the purchase of the notes for sixty days.'

"This was the letter which they sent them with the subscription form.

"The Referee: This is June 15, 1961, and on May 5, 1961 you had the sixty days. So, how could the letter of June 15, 1961 tell the witness about that?

"Mr. Doskow: It confirms the witness' testimony, sir" (SMP 330, 331, 332).

"The Referee: I do not doubt that somebody suggested sixty days. I merely asked why sixty days was thrown in when no one knew that within sixty

days the notes would be available for delivery?

"The Witness: Sixty days after the lease was signed they had to buy and deposit the $250,000 in notes, Now, he wanted sixty days more to do that.

"At the time he made that request neither he nor I knew that even within the sixty days you couldn't have purchased the full $250,000 of notes.

"The Referee: You could not have purchased a dime's worth of them. They had not been authorized.

"The Witness: That is correct, your Honor.

"The Referee: Now, what was the prospective date for executing this lease?

"The Witness: Well, we had hoped to execute it sometime in April but it spilled over until May 5th, 1961.

"The Referee: So that really you were originally to execute it when this April 27, 1961 galley had been finished; is that correct?

"The Witness: That was pretty close to the last date" (SMP 334, 335, 336)

The Trustee's attorney asked Mr. Weinstein "how do you connect the requirements of Paragraph 41st with the World's Fair subscription agreement," and the witness said:

". . . there is no description at all in Article 41st as to the terms of the definition of 6% promissory notes of the World's Fair Corporation, unless it referred to an existing document which sets the terms of those notes" (SMP 343).

"Q. Then, wouldn't it have been just as easy for the Amphitheatre to give a check for $250,000 to the

World's Fair, and gotten back a 6% promissory note, apart from any subscription that was then being undertaken, Mr. Weinstein?

"A. You asked the question, 'Would it have been possible.' No, because the parties contemplated that this was the 6% promissory note referred to in the forty million dollar offering, and that had to be processed through the Chase Manhattan Bank" (SMP 344, 345).

After being asked if he did not think it important enough to identify the notes referred to in Paragraph 41st, Mr. Weinstein answered:

"In everybody's minds there was no question but that this referred to the promissory note in the forty million dollar offering.

"Q. I am now reading from Paragraph 41st, Mr. Weinstein. It doesn't state what was in everybody's minds except what you had dictated and transcribed, and it was signed by the parties; is that correct?

"A. I was perhaps deficient in my drafting because I had never conceived that we were talking about any other kind of obligation of the World's Fair than the forty million dollar offering.

* * *

"Q. But under this agreement, the tenant, Amphitheatre, Inc., could have given $250,000 in a bulk sum to the Fair Corporation, and gotten back a note for $250,000, could it not?

"No, it couldn't because it wouldn't have been accepted, because the purpose of the subscription for the promissory notes was to achieve a sale of about

one per cent of the twenty-five million dollars required to put the forty million dollar offering over the hump, so that they would have that offering effective.

"It was never the intention to issue any promissory note outside of the forty million dollar subscription offering" (SMP 345, 346).

Realizing it would be impossible for the Fair Notes to be deposited within 60 days, the July 10th amendment was prepared and then to permit the Agent to accept payment in full under the subscription instead of installments as originally provided, Amendatory Agreement No. 3 was adopted and it was eventually stipulated that the amendment was duly adopted and binding on Amphitheatre as a subscriber.

Mr. Weinstein addressed a letter dated July 5, 1961 to Mr. Harold Stern enclosing a draft of the July 10th agreement (Fair exhibit J). This letter was marked Trustee's Exhibit 9 and the draft of the agreement enclosed with that letter was marked Trustee's Exhibit 9-A, 7/19/66 (SMP 355, 356). (Note: a previous Exhibit 9 was stricken, See SMP 269).

Mr. Weinstein said that the letter and the proposed draft of the amendatory agreement was prepared to correct the problem in Article 41st of the lease (SMP 356).

"Q. By that do you mean, Mr. Weinstein, that they couldn't comply with Article 41st of the lease because the subscription agreement of June 21, 1961 only permitted them to pay $100,000 then, and there were deferred payments of $50,000 over three years; is that correct?

"A. That is correct.

"Q. And the Fair Corporation, if it was to get the $250,000 sooner, had to have some modification of the subscription agreement or a modification of the lease, so that it could comply with its subscription agreement as it was modified in order to permit them to deposit immediately $250,000; is that correct, Mr. Weinstein?

"A. In your question you say 'in order for the Fair Corporation to get the $250,000 sooner.' It was in order to permit them to purchase the entire $250,000 in notes to deposit as security under Article 41st of the lease as amended in compliance with their agreement.

"Q. Well, on July 10, 1961, or rather on July 5, 1961 when you wrote this letter, the subscription agreement had not yet been amended because it wasn't until August 1, 1961 that it was amended; isn't that correct, Mr. Weinstein?

"A. That s right, yes.

"Q. So that they now contemplated an amendment, so that Amphitheatre could pay $250,000 sooner than was required under the subscription agreement, is that correct?

"Mr. Adelman: Will you answer that question, please Mr. Weinstein?

"The Witness: As of July 5, 1961, the Amphitheatre was then in default under the lease, because it did not and it could not deposit the $250,000 of notes since they were not available.

• • •

"The Referee: Was it then in default or had you provided an impossibility for them to perform.

"The Witness: The question of whether that covenant was enforceable or not was not before us then. We were overcoming the problem.

"The Referee: Yes, it was before you then, and that is why you prepared this draft, is it not?

"The Witness: We prepared this draft in order to provide a means of overcoming an impossibility in the lease.

* * *

"The Referee: So that there is no question of default involved, is there?

"The Witness: It is a question of how you characterize their inability to put up the notes" (SMP 356, 357, 358, 359, 360).

Trustee's attorney then asked this witness again what was to prevent Amphitheatre when they had to get a note of the World's Fair for $250,000 from issuing its check for $250,000 to the World's Fair and have the World's Fair issue a promissory note for 6% and deposit that note as security under the lease. Mr. Weinstein did not agree with that possibility because the parties contemplated that Amphitheatre would purchase part of the 40 million dollar issue of notes. The kind of note required under Article 41st was not designated.

"The Referee: (Interposing) If the parties intended that it be a series of notes of the 40 million dollar issue, then you had an impossibility in that lease.

"The Witness: That is right, your Honor. If this were any promissory note and the terms weren't

stated, they could have issued a check for $250,000 and said 'Give us a promissory note,' and we could have given them any promissory note.

"The Referee: Would it have made any difference?

"The Witness: Yes, because that wasn't the purpose of being willing to accept the notes in lieu of the performance bond" (SMP 363).

Conceding the impossibility of furnishing the security as required by Article 41st of the lease, and that it was not the intention of the Fair Corporation to hold the tenant in default, this condition was cured by the provision of the letter agreement of July 10th which referred to "Such promissory notes to be issued to you pursuant to the aforesaid subscription agreement shall thereafter be held by us in accordance with the provisions of Article 41st of our aforesaid agreement of lease" (SMP 366).

Mr. Rudel, on behalf of Amphitheatre, signed the letter agreement of July 10, 1961 and returned it to the Fair Corporation with his letter to Mr. Irwin Witt, dated July 14, 1961, in which he enclosed a note made by Amphitheatre to the Fair Corporation as payee for $150,000 with interest at 6% from July 5, 1961 to September 15, 1961 when the note became due, that was personally endorsed by him. Mr. Weinstein was asked:

"Q. . . . What was the reason why Amphitheatre had to pay interest on a subscription which wasn't due at that time until three years hence?

A. I don't recall. It was a business matter in which I would not have made a decision, and I don't remember who gave me such instructions.

• • •

"Q. Well, let's put ourselves in the posture of the parties on July 5, 1961 or on July 10, 1961 when you wrote this modification, Mr. Weinstein. They had ready to deposit $100,000, but they couldn't pay the other $150,000 until you had passed an amendment permitting the payment in full, and that didn't take place until sometime in August. So why were they required to pay interest on the $150,000 until it was to be paid, Mr. Weinstein, do you know?

"A. No, I don't know.

"Q. Did anybody ever tell you why that was inserted there?

"A. No.

"Q. Did you ever ask Mr. Witt why that was inserted there? This letter was prepared at Mr. Witt's suggestion, wasn't it?

"A. The amendment was prepared at Mr. Witt's suggestion, yes" (SMP 376, 377, 378).

Stressing the fact that the subscription agreement provided for three annual payments which could not be modified by the letter agreement of July 10, 1961 and inferring that there was then no assurance that the Fair Corporation would be able to use the $150,000 to buy Fair notes as provided in the letter agreement, the witness said:

"Your Honor, at the time this July 10, 1961 agreement was drafted and signed, it contemplated because we were working on the August 1st amendatory agreement, this contemplated that that amendment would be adopted to the subscription agree-

ment, and it was designed to fit in with that amendatory agreement" (SMP 381).

But he conceded that the amendatory agreement had not been adopted sooner because of the time required to go through the various steps for that purpose.

> "Q. Mr. Weinstein, as I recall it you said that one of the things Mr. Witt said to the Amphitheatre group was to buy these notes because he wanted to reach the goal of twenty-five million dollars, and that it would look good if the exhibitor showed its faith; is that correct?
>
> "A. That is correct" (SMP 383).

Mr. Weinstein agreed that there is no provision in the letter agreement (Fair Exhibit J) or in any of the agreements which covers the contingency that the Fair Corporation might not have sold the 25-million dollars of its notes within the time specified (SMP 394).

On redirect examination, he was asked:

> "Q. Mr. Weinstein, I want to ask you this question. In any of the negotiations leading up to this lease, did you have any intention to evade or to circumvent the provisions of Section 233 of the Real Property Law?
>
> "A. I did not consider it, and I did nothing to evade or avoid the statute" (SMP 396, 397).

On recross examination, Mr. Weinstein testified that he was generally aware of the provisions of Section 233 of

the Real Property Law but he was not aware of the part that reads:

> "Any provision of such a contract or agreement whereby the person who so advanced money waives any provision of this section is absolutely void."

Mr. Weinstein said concerning the security:

> "Your Honor, in looking at it at this time, in looking back at it, it looks peculiar. However, in looking at it at the time we were negotiating there was Harold Stern who was a very prominent and competent attorney, there was Same [sic] Becker, who was also a very prominent and competent attorney, and there was Mr. Sapienza who represented Mr. Rudel.
>
> "Each one of these three people each had their own lawyers, all against me, and I was the only one representing the Fair Corporation at the time. At the time I wanted to get this $750,000 performance bond, and it just flowed very naturally when they objected to this bond because of the cost" (SMP 402, 403).
>
> • • •
>
> "It happened very naturally. This lease document was looked over by the three attorneys, Mr. Sapienza, Mr. Stern and Mr. Becker. None of them raised this question. I didn't realize that this kind of proceeding would ever be brought. As I said I was shocked when Mr. Doskow told me about it in December of 1964. I think other people at the Fair saw this. I think general counsel for the Fair saw this. John Thornton of the Firm of Whitman, Ransom & Coulson saw this in the first draft, and

never raised the question or saying that 'You have a problem here' " (SMP 403, 404).

The deposition of Judge Rosenman was taken on November 11, 1965, by the Trustee's attorney in connection with this controversy, and Mr. Doskow read from pages 34 and 35 of that transcript as follows:

"Q. Do you know whether at that meeting on March 13th the New York Statute relating to the deposit of money as security was discussed or mentioned by anyone?

"A. I know it was not.

* * *

"Q. At any other meeting was the New York Statute discussed?

"A. Never until the insolvency of Amphitheatre" (SMP 406).

Trustee's attorney asked Mr. Doskow how many subscribers took advantage of Amendatory Agreement No. 3 after it was passed and Mr. Doskow said:

"I will even concede that the only one who took advantage of it was Amphitheatre. Inc." (SMP 419).

At that point Mr. Adelman conceded that the Amendatory Agreement No. 3 was properly passed and that after it was passed the only subscriber who took advantage of it and prepaid was Amphitheatre, Inc.

Based upon the foregoing testimony, stipulations and admissions, I make the following findings of fact.

Decision

1. By agreement of lease dated May 5, 1961 (herein called the Lease), the Fair Corporation leased to Amphitheatre, Incorporated (Herein called Amphitheatre or Bankrupt) the premises known as the New York State Amphitheatre and Exhibit Building (herein called the Premises) for a term commencing on January 1, 1962 and expiring, unless sooner terminated, on the final day of the New York World's Fair in 1965.

2. Article Forty-first of the aforesaid lease provides:

> "Within sixty days after the execution of this lease by the Producer and delivery thereof to the Fair Corporation, the Producer shall deposit with the Fair Corporation (and shall keep deposited throughout the Term) $250,000 principal amount of the Fair Corporation's 6% Promissory notes purchased from the Fair Corporation by the Producer, as security for the full, faithful and prompt performance of, and compliance with, on the part of the Producer of all of the terms, covenants, agreements and conditions of this lease on its part to be performed, kept and observed. So long as the Producer is not in default under this lease the Producer shall be entitled to receive the interest paid on such Notes. In addition to any and all other remedies available to it under this lease or otherwise, the Fair Corporation shall have the right, at its option, at any time and from time, to use the security or any part thereof in whole or partial satisfaction of any of its claims or demands against the Producer. There shall be no obligation on the Fair Corporation to exercise such right and neither the existence of such right nor the holding of the security itself shall cure

any default or breach on the part of the Producer. In the event that the Fair Corporation shall at any time or times so use the security or a part thereof, the Producer shall on demand of the Fair Corporation and within two (2) days thereafter, deposit with the Fair Corporation additional Fair Corporation 6% Promissory Notes or cash so as to maintain the deposit at all times to the full amount of $250,000; all such additional security shall be subject to all the conditions of this Article. After the end of the Term and upon condition that the Producer shall then be nowise in default under any part of this lease and shall have restored the Promises or required herein, and upon written request therefor by the producer, the Fair Corporation will return the security to the Producer, less the amount of any and all unpaid claims and damages of the Fair Corporation by reason of any breach or default by the Producer under this lease or any part thereof. The Producer agrees that it will not assign or encumber said security."

3. Prior to the execution of this lease and specifically with respect to the security provisions thereof, the following negotiations took place:

"(a) On February 2, 1961, a group later to become the principals who organized the bankrupt corporation, through their attorney, proposed to lease the premises known as the 'Amphitheatre' and stated 'that satisfactory assurances of the performance of the agreement and adequate financial responsibility will be furnished.'

(b) At a meeting held between the bankrupt's principals and representatives of the Fair Corporation

on March 13, 1961, the bankrupt's proposal of February 2, 1961 as to security was not acceptable to the Fair Corporation which proposed that a surety company bond for $750,000 be posted by the Bankrupt to secure the Bankrupt's performance under the lease, which proposal was rejected by the Bankrupt's principals.

(c) The Fair Corporation then proposed to accept $750,000 of Fair Corporation notes as security under the lease in lieu of the surety company bond for said sum, which proposal was rejected by the bankrupt's principals. The Fair Corporation then reduced the amount of the notes from $750,000 to $600,000 which proposal was again rejected by the bankrupt's principals.

(d) The bankrupt's principals then offered to deposit $250,000 in cash as security under the lease together with the personal guarantee of Thomas R. Rudel to take up any additional amount that was necessary, if same was necessary. In lieu of a performance bond, the producers offered to deposit $250,000 together with the personal guarantee of Mr. Thomas R. Rudell [sic] to insure the performance of the terms of the lease then being negotiated. During the negotiations at the meetings of March 13 and 23, 1961, both Meyer Davis and Mr. Becker said that cash security was offered. Mr. Witt's affidavit and Mr. Weinstein's testimony indicated that security in the form of money was not offered. The negotiations terminated with the producers agreeing to purchase Fair Corporation notes as security.

(e) The Fair Corporation indicated to the Producers that if they offered to purchase Fair Corpo-

ration notes, such factor would be a very potent influence in favor of securing the lease for the Amphitheatre premises."

4. Agreement as to amount of security had not been reached at the March 22, 1961 conference. However, on March 23, 1961 according to Fair's Exhibit I, which was a memorandum from Kaye to Judge Rosenman and to Weinstein, dated March 23, 1961, Producer offered to buy $250,000 worth of Fair notes, viz:

> "I had a telephone call today from Sam Becker. Sam says that Rudel has agreed to buy $250,000 worth of Fair notes. In return, however, he would like to defer the payment of the last $200,000 of fixed rent to the end of 1964. . . ."

The last payment of fixed rent was deferred as requested.

(5) On or about June 15, 1961, Amphitheatre received from the Fair Corporation a printed form of subscription for $250,000 principal amount of Fair Corporation 6% Promissory Notes. On June 21, 1961, the President of Amphitheatre signed this printed form of subscription adding a legend in his handwriting "in accordance with agreement of May 5, 1961." The subscription was accepted by the Fair Corporation on June 26, 1961.

6. Accompanying said subscription was an official statement dated April 10, 1961 by the Fair Corporation with respect to the issuance of a forty million dollar offering of Fair Corporation 6% promissory notes and a subscription agreement. The subscription agreement among other things sets forth the following:

Decision

2. • • • "Each of the Subscribers severally agrees, on the terms of this Agreement, to lend to the Corporation, and the Corporation agrees to borrow from each of the Subscribers, at the office of the Agent designated as provided in Section 3, the sum, to be evidenced by Promissory Notes of the Corporation, specified in the subscription executed by such Subscriber and delivered to the Agent." • • •

4. • • • "The Notes shall constitute direct and general obligations of the Corporation in accordance with their terms." • • •

9.(b) • • • "All revenues, rates, fees, charges, rents (other than rental deposits of [sic]* payments reserved for a special purpose under the terms of a lease) and other income and receipts derived by or for the account of the Corporation from the operation of the 1964-1965 New York World's Fair from and after the Closing Date, including the investments, if any, thereof and the proceeds of the Notes will be applied to the payment of principal of and interest on the Notes in accordance with their terms and the provisions of this Agreement, subject only to the application thereof to the costs and expenses of the Corporation in connection with construction, operation and maintenance of the 1964-1965 New York World's Fair, including necessary reserves thereof." • • •

7. On July 10, 1961, more than 60 days after the execution of the lease, Article Forty-first of the lease was modified by a letter agreement so that in lieu of a deposit of Fair Corporation promissory notes within 60 days after

* Original exhibit reads "or".

execution, Amphitheatre paid to the Fair Corporation $100,000 and delivered to the Fair Corporation its promissory note for $150,000 endorsed by Thomas R. Rudel, payable to the order of the Fair Corporation on September 15, 1961 with interest at 6% per annum from July 5, 1961.

8. The Subscription Agreement became effective in accordance with its terms on or about July 14, 1961, when subscriptions for an aggregate of $25 million principal amount of notes had been received.

9. The subscription Agreement as originally printed and circulated provided in the case of subscriptions for a sum in excess of $5,000, that the subscriber was to pay 40% on a closing date designated by the Fair Corporation and the balance in three equal installments payable January 1 of each of the years 1962, 1963 and 1964. By Amendatory Agreement No. 3, effective as of August 1, 1961, the Subscription Agreement was amended to permit earlier payment of subscriptions at the election of the subscriber. Amendatory Agreement No. 3 was duly adopted in accordance with the procedure provided in the Subscription Agreement for the amendment thereof. Adoption of that Amendatory Agreement was contemplated when the letter amendment dated July 10, 1961 was executed.

10. Said amendment to the subscription agreement was adopted by the Fair Corporation with the sole purpose and intent of requiring Amphitheatre to pay the balance of $150,000 in one payment on September 15, 1961, or as soon as the subscription agreement became effective after said date instead of in installments of $50,000 each on January 1, 1962, January 1, 1963 and January 1, 1964.

Decision

11. On August 15, 1961, Amphitheatre prepaid to the Fair Corporation its promissory note in the sum of $150,000 due September 15, 1961 together with interest of $1,125.00.

12. The Chase Manhattan Bank, as Agent, issued two notes payable to the order of Amphitheatre, Inc., one for $100,000 dated July 21, 1961 and the other for $150,000 dated August 17, 1961. The form of note issued to all subscribers (including Amphitheatre) provided that it was subject to the terms and conditions contained in the Subscription Agreement. All the notes bore interest at the rate of 6% per annum payable on February 1 and August 1 in each year. All the notes were payable on August 1, 1966 which was more than nine months after the end of the term of the Amphitheatre lease.

13. The interest on the two notes issued to Amphitheatre was paid to Amphitheatre on each interest-payment date prior to the filing of its petition for an arrangement under Chapter XI of the Bankruptcy Act. The filing of that petition on June 29, 1964 constituted a default under Article Thirty-third of the lease. Thereafter, the interest on its notes when due was deposited in a separate security account at the Chase Manhattan Bank.

14. On August 1, 1964 there was a prepayment to all holders of notes of 25% of the principal amount of the notes. The prepayment in the sum of $62,500 with respect to the notes issued to Amphitheatre was deposited in a separate security account at the Chase Manhattan Bank.

15. The deposit required by the order of this Court dated May 6, 1966, includes the aforementioned sums paid,

after the filing of the Chapter XI petition herein, on account of the notes issued to Amphitheatre plus the additional sum of $187,500 with interest thereon at the rate of 6% per annum from August 1, 1965 to the date of deposit.

16. The Fair Corporation has complied with the aforementioned order of this Court dated May 6, 1966.

17. Amphitheatre was the only tenant of the Fair Corporation whose lease provided for the purchase and deposit by the tenant of Fair Corporation notes as security thereunder.

18. Amphitheatre was the only subscriber which prepaid the entire amount due under the subscription agreement as permitted by the Amendatory Agreement No. 3 of August 1, 1961, and the only subscriber required to make such prepayment.

19. The modification of Article Forty-first of the lease by letter agreement dated July 10, 1961 and the amendment of the subscription agreement dated August 1, 1961, were made with intent on the part of the Fair Corporation to obtain the full sum of $250,000 from Amphitheatre at the earliest possible date and said sum of $250,000 was actually so paid by Amphitheatre and received by the Fair Corporation.

20. Amphitheatre's subscription amounted to one per cent of the total of the 25 million subscriptions required to make the subscription agreement effective in accordance with its terms, and according to the terms of the subscription agreement, which were not amended, the monies paid to purchase the Fair notes constituted a loan to that Corporation by Amphitheatre of $250,000.

Decision

21. Payment of its subscription by Amphitheatre allowed the Fair Corporation to use said $250,000 pursuant to the terms of the subscription agreement as soon as the notes were issued, because neither the Fair Corporation nor its agent placed said sum in a segregated or security account for Amphitheatre or other tenants after said notes were issued.

22. The Fair Corporation's Controller (Mr. Witt) stated that Amphitheatre was requested by the Fair Corporation to subscribe to notes in order to establish a precedent which might be helpful to the Fair Corporation in its efforts to sell notes to other exhibitors at the World's Fair. There is no proof that Amphitheatre's subscription was ever used to promote the sale of Fair Corporation notes to others.

23. Amphitheatre agreed in good faith to subscribe to the notes as a result of arm's-length bargaining, and with the full understanding on the part of Fair Corporation and Amphitheatre that Amphitheatre would thereby become a party to the subscription agreement, to which all other purchasers of notes were parties, as the subscription agreement was modified by Amendatory Agreement No. 3.

24. Amphitheatre was required to pay $250,000 to Fair Corporation to purchase notes, to be used as security under the lease, and the repayment of that $250,000 was the Fair Corporation's obligation subject only to the terms of Article Forty-first of the lease. The payment was not intended by Amphitheatre to be an investment in the Fair Corporation's enterprise.

25. The notes were part of an issue of $40 million that was offered to the public for the purpose of raising funds to pay the cost of construction and pre-opening expenses of the New York World's Fair. During the period in which the lease was being negotiated, the Fair Corporation was seeking subscriptions to the note issue from prospective exhibitors at the World's Fair and others.

26. Amphitheatre was dependent entirely on visitors to the World's Fair for audiences at the show which it was to present on the premises, and its promoters desired the Fair to become operative so that visitors would be attracted to it and attend its show.

27. The Official Statement (Fair Exhibit F, 6/23/66 at p. 7) contains the following statement about its notes:

> ". . . Practically all funds made available to the Corporation before the opening of the World's Fair to the public will presumably have been spent prior to such opening. In view of the nature of the enterprise the Notes may not be considered free from a risk as a financial investment."

28. At no time during the negotiations was there any mention of the New York Statute relating to the deposit of money as security under a lease of real property (then Section 233 of the Real Property Law; now Section 7-103 of the General Obligations Law).

29. The Fair's attorneys knew that cash deposited as security under the lease had to be held in a separate account and would not be available to the Fair until and if Amphitheatre defaulted.

Decision

30. The Official Statement of April 10, 1961, was in process of preparation during negotiations for the Amphitheatre lease. That Official Statement was to take the place of one dated in the previous December, and in both Official Statements it was provided that the subscriptions would not become effective until they aggregrated a stated amount. Therefore no one knew at what future date notes could be issued by the Fair Corporation's Agent. The December Official Statement was abandoned or superceded by the Statement of April 10, 1961.

31. The first draft of Article Forty-first of the lease, which required that notes be delivered upon its execution, imposed a condition that the tenant could not perform. The final draft of the lease and as it was signed, required the deposit of notes within sixty days after its execution. But there was no assurance that within sixty days after the execution of the lease on May 5, 1961, the subscription agreement would become effective and the Fair notes could be issued, because no one knew when subscriptions would aggregate $25,000,000.

32. The letter agreement of July 10, 1961 was a means devised by the Fair Corporation to overcome the provisions of Article Forty-first of the lease that required a deposit of security within sixty days after its execution, and was also devised to circumvent the provisions of the subscription agreement that required installment payments at that time. The letter agreement anticipated the Amendatory Agreement No. 3 which became effective on August 1, 1961.

Decision

33. The letter agreement of July 10, 1961 enabled the Fair Corporation to receive and hold $250,000 temporarily in escrow. Of this sum it received and used $100,000 (40 percent of the Amphitheatre subscription) as soon as the subscribers agreement became effective and it used the remaining $150,000 after August 1, 1961 when the Amendatory Agreement No. 3 became effective; in that manner $250,000 of the World's Fair notes were purchased in the name of Amphitheatre, Incorporated to be held as security.

34. In addition to the $250,000 received for the issuance of its promissory notes, the Fair Corporation also received interest of $1,125.00 on the $150,000 note made by Amphitheatre although deferred payments under the subscription agreement did not bear interest.

35. The Fair Corporation notes were never endorsed by Amphitheatre, Incorporated. They were delivered when issued by the agent to the Fair Corporation and held by it as security until November 1964, when it sent them to the agent who now has them.

36. Article Forty-first of the lease agreement does not specify or describe the Fair Corporation notes that were to be deposited by Amphitheatre as security. The Fair Corporation required Amphitheatre to subscribe to the 40 million dollar issue of Fair Corporation's six percent (6%) notes although any six percent note issued by the Fair Corporation would have satisfied the terms and conditions of Article Forty-first of the lease agreement. Had the Fair Corporation made and issued to Amphitheatre, its six percent notes (other than notes of the 40 million

dollar issue) the provisions of Article Forty-first of the lease would have been complied with and there would have been no need for the letter agreement of July 10, 1961 or the Amendatory Agreement No. 3 effective August 1, 1961.

37. The Fair Corporation filed its proof of claim in this proceeding on July 6, 1965 (Claim No. 131) in the sum of $1,332,746.24. Part of this claim asserts liquidated damages under Article Thirty-sixth of the lease agreement equal to the excess of $1,000,000 over the minimum rent paid of $250,000, amounting to $750,000; and it states that the Fair Corporation does not hold any security for the debt and liability of the bankrupt except:

A. 6% Promissory notes in the aggregate face amount of $250,000 the unpaid principal balance of which has been reduced to $187,500.

B. The sum of $62,500 in cash representing a 25% repayment made on August 1, 1964 on account of the notes.

C. The sum of $7,500 in cash representing the semi-annual interest payment on the notes paid on August 1, 1964.

NOTE: Under the Trustee's Eighth Affirmative Defense Set-off and Counter-claim tried in a separate proceeding and not a part of the present trial, the sum of $50,000 which had been held in a separate trust account by the Fair Corporation pursuant to so-called roof agreement, was released to the use and benefit of the Fair Corporation as a credit against its claim and the Trustee's Eighth Affirmative Defense Set-off and Counter-claim was dismissed.

Decision

Conclusion

Judge Rosling discusses the effect of the Real Property Law, Section 233 and the General Obligations Law, Section 7-103 at Page 26, et seq., of his opinion and holds that these sections do not bar nor undertake to bring within its operative reach other relationships such as arise in respect of loans or purchases to which the landlord and his tenants are parties, as distinguished from a deposit of security or payment of rent under a lease. See Page 17, supra. And in his footnote 22 he cites cases which recognize that a legal relationship may subsist between landlord and tenant other than one which presupposes a deposit of security or payment of rent under a lease. In view of the testimony herein these cases are inapposite.

These cases, six in number are discussed in the admirable briefs submitted by the Attorneys for the Trustee and the Attorneys for the Fair Corporation. These citations are not directly in point because in none of them were the facts similar to the facts in this case. Neither party has found or cites a case directly in point and I have found none. The legal reasoning in several of these cases appears to be pertinent and will be set forth blow.

The Fair Corporation's memorandum summarizes what its attorney alleges to be the two distinct grounds on which the Court must hold that the transfer here involved was not prohibited by the statute.

The first ground is that the statute, Section 233 of the Real Property Law, applies by its terms only whenever *money* shall be deposited or advanced on a contract for the use or rental of real property as security; that the security which the bankrupt deposited was not money but 6% Promissory Notes purchased under a separate and distinct con-

tract. The separate and distinct contract alluded to is the subscription under the terms of the subscription agreement as distinguished from the lease, and he rationalizes:

> "If the money had been intended as security, it would have been repayable to the tenant, in the absence of default, at the end of the term, and under the statute the tenant would then have been entitled at that time to receive the 'interest accruing thereon, if any'. Under the lease, if there were no default, the tenant was to receive, at the end of the term, not the money which it had paid for the Notes but the Notes themselves. Those Notes did not become payable until August 1, 1966, almost a year after the end of the term. . . ." (P. 37)

But Section 233 of the Real Property Law (which has been replaced by Section 7-103 of the General Obligations Law, Paragraphs 1 and 3) provides that moneys deposited or advanced shall continue to be the money of the person making such deposit and shall be held in trust for such person and shall not be mingled with the personal moneys or become an asset of the person receiving same "but may be disposed of as provided in section thirteen hundred and two-a of the penal law."

Penal Law, Section 1302-a, provides:

> "1. Any person, firm or corporation and the employers, officers or agents thereof, whether the owner or lessee of the property leased, who or which has or hereafter shall have received from a tenant or licensee a sum of money or *any other thing of value as a deposit or advance of rental as security for the full performance by such tenant or licensee of the terms*

of his lease or license agreement, or who or which has or shall have received the same from a former owner or lessee, shall, upon conveying such property or assigning his or its lease to another, or upon the conveyance of such property to another person, firm or corporation by a referee in an action to foreclose a mortgage thereon, at the time of the delivery of the deed or instrument or assignment, or within five days thereafter, or within five days after the making and entry of any order of the court discharging the receiver, deal with the security deposit in one of the three following ways:

* * *

"B. Return the sum so deposited to such tenant or licensee, or to his appointee or designee duly authorized in writing by such tenant to receive the same. . . . " (Emphasis mine)

Section 1302-a does not refer specifically to a return of a security deposit to a tenant at the termination of the term (subject, of course, to the application of said security to the payments due under the lease where the provisions of Section 7-103 of the General Obligations Law have not been violated). But a construction that such return is required by Section 1302-a is inescapable because it is incorporated by reference in Section 233, Real Property Law, and it is also incorporated by reference in Paragraph 1 of Section 7-103 of the General Obligations Law. Said Section 1302-a of the Penal Law also provides that a failure to comply with its provisions is a misdemeanor. Therefore, it is obvious that these two sections are in pari passu and *any other thing of value as a deposit or advance* of rental as security must be accounted for and turned over by the landlord in the

same way that he is required to account for a deposit of money. *Wald* v. *Gold,* 1 Misc. 2d, 756, 147 N. Y. Sup. 2d, 250.

The Fair contends that the Trustee is bound by the terms of the lease which provides that at the end of the term, instead of money, the tenant was to receive Notes which would not become payable until almost a year after the end of the term. This contention is not supported by the lease. The Forty-first Article of the lease requires the Fair Corporation to return the security after the end of the term, less the amount of any and all unpaid claims and damages of Fair Corporation upon written request therefor by the Producer. This provision was never modified to extend the time for accounting and set-off by the parties beyond the end of the term, when the balance of the account owing to the Producer, if any, had to be paid. Payment of such balance by Fair Corporation Notes to Amphitheatre is not mentioned in Article Forty-first and to construe that Article to require settlement by the payment of Fair Corporation Notes would strain the reason of any but the most naive. Significant too is the provision in said Article for the deposit of either additional Notes or cash so as to maintain deposit at all times to the full amount of $250,000. There is no distinction between the use of such cash or of such Notes as security even though such additional Notes might have been acquired by the use of a subscription similar to "Exhibit A" annexed to Fair Ex. G of 6/23/66.

The second ground urged by the Fair Corporation for holding that the transaction was not prohibited by the statute is that the bankrupt's purchase of World's Fair Notes, bona fide, constituted a loan to the Fair Corporation which was not prohibited by statute; that the transaction was entered into in good faith without a purpose to evade the requirements of the statute on which the Trustee relies.

Decision

The Fair Corporation's reply brief, Pages 2 and 3, attempts to show that Mr. Becker, the Producer's attorney, denied that a cash deposit of $250,000 had been offered by the Producers during negotiations for the lease. It refers to the colloquy in the testimony at SMP 154-55 where he said:

> "We never offered anything. . . . We were in the course of negotiations.
>
> "We finally got them to agree that $250,000 would be satisfactory. That was the minimum that we could get out of the World's Fair at that time."

The quoted testimony does not show that cash was not offered.

Indeed, both Mr. Davis and Mr. Becker have stated that cash was offered and that Mr. Witt suggested that the deposit did not need to be in cash but that they could buy Notes and put them up instead. Mr. Becker, also said, in substance, that he endeavored at all times to minimize the payments that had been required of the Producers in order to obtain a lease. The Producers countered Fair Corporation's demand for a $650,000 purchase of its notes with a refusal, but later they agreed to purchase Notes.

A reasonable interpretation of Mr. Becker's testimony that "We never offered anything" would be that during the negotiations the Producers received demands from the Fair Corporation's officers which they refused until a minimum demand was made which Mr. Witt would not decrease. The Notes purchased as security were intended by the parties to be Notes of the 40 million dollar issue. Producers had no intention during the negotiations to subscribe to those Notes except for the purpose of obtaining a lease, a condition which Mr. Witt had imposed on the Producers.

Unfortunately, Mr. Witt died prior to this trial and although his affidavit has been admitted as genuine, testimony shows some substantial disagreement with the statements contained in it and he is not available for cross-examinaiton. The statements in the affidavit do not have the same weight as the uncontroverted testimony of witnesses given on examination.

The Fair Corporation and its promoters endeavored to show by the Official Statement a highly profitable operation with a substantial surplus to be used to convert the World's Fair site into a public park. The Producers set forth in glowing terms in their offer of February 2nd, (Trustee's Exhibit 1) their proposed phantasia spectacular embracing new entertainment from all corners of the earth with hope for revenues that would justify the Producers' incurring the many obligations imposed by the lease. The lease was negotiated and executed with a provision in its Forty-first Article about furnishing security in the form of Fair Corporation Notes within sixty (60) days after its execution, a provision that was impossible for the Amphitheatre as tenant to perform. So the Fair Corporation's attorneys devised the letter of July 10, 1961 which modified Article Forty-first, and they devised the Amendatory Agreement No. 3 which permitted the Amphitheatre to pay in full the whole amount required of its Note purchase before any other tenant and as the only tenant which was required to and did pay its subscription under said Amendatory Agreement No. 3. This purchase represented 1% of the total subscriptions required to validate the 40 million dollar Note issue and it accomplished a deposit of $250,000 into the coffers of the Fair Corporation at a time when the Official Statement shows that the Fair Corporation was in need of these funds for the purpose of the Fair.

Amphitheatre through its promoters agreed to these provisions but we must not overlook the fact that the reason it signed the subscription was to comply with the provisions of Article Forty-first of the lease, not for the reason, as the Fair Corporation would have us believe, of investing in Notes as a loan to the Fair Corporation.

If we assume that security in any form satisfactory to the parties could be deposited under a lease then we might assume that a landlord could require a tenant to deposit stocks, bonds, debentures or the promissory note of a third party. In such instance both the landlord and the tenant presumably would have intended to apply the market value of such third party securities under the terms of our suppositious lease to satisfy the demands or claims of the landlord, or if he had none to return such securities to the tenant at the termination of the term. However, if the landlord converted such securities into cash and mingled the cash with his own funds without and prior to a proper application of the cash proceeds pursuant to the terms of that suppositious lease, he would have accomplished a conversion of the landlord's security in violation of the applicable statutes.

But, is a Promissory Note of a landlord uttered in return for a payment to the landlord by the tenant properly designated security for the performance of the terms and covenants in the lease when the payment for which the Note is issued was mingled with the landlord's own funds, with the consent of the tenant, and the note was held by the landlord?

I think this would be a transaction prohibited by statute if the payment or the note is intended to be security, regardless of who holds the note. Absent certain peculiar

benefits to the tenant, discussed below, such a payment would be a loan also proscribed by statute. The Notes, as the Trustee contends, converted the security transaction into a debtor-creditor relationship without the creation of a trust account for the segregation of the $250,000 payment for the benefit of the tenant and made that security transaction absolutely void as to him.

Assume that at the end of the term (or as of August 1, 1966) when the Notes became payable Amphitheatre was not in default under any of the terms and provisions of its lease. At that time did Amphitheatre intend that the return of the notes as security would satisfy the provisions of Article Forty-first of the lease? Did Amphitheatre then intend to accept whatever the Fair Corporation would be able to pay on account of its obligation under the notes if such payment were less than 100% with interest? No provision in that article required such a result and that result would be contrary to the intention of the parties, although admittedly that would be the end result of the transaction if the Fair Corporation could not pay its notes in full at the end of the term or at their maturity. To say this differently: if the Fair Corporation could only pay on its 6% Note obligation at maturity, 40% of the amount subscribed, then I could not find that it would have been the intention of Amphitheatre to accept as a return of its security, if there were no default under the lease, 40% of its $250,000 subscription.

Eminent counsel represented the Producers and Amphitheatre and the Fair Corporation and they are charged with knowledge of Section 7-103 of the General Obligations Law and of Section 233 of the Real Property Law and the non waiver provision of each section. Article

9(b) of the Subscription Agreement, as well as the Official Statement at Page 2, made specific exception from the use of Fair Corporation's revenues, of rental deposits or payments reserved for a special purpose under the terms of a lease. The failure to discuss or to consider this statute, if applicable, cannot excuse or condone this transaction even if consented to by Amphitheatre, if the purchase of the Notes in fact constituted a deposit of money as security under the lease which was mingled with the Fair Corporation's funds and not set apart and held in trust for the tenant.

The instances where pursuant to agreement between the landlord and the tenant the payment advanced by the tenant has been held to be a loan which did not violate the interdiction of the statute must be distinguished from those cases where deposit was intended to be security and not intended to be a loan. Where the advance has been held to be a loan and not security, the language of the contracts have been unambiguous clearly defining the intention of the parties. *Barrow Associates* v. *South Broad Realty Corp.* (Sup. Ct., NY), N. Y. L. J., April 22, 1949, p. 1450, Aff'd 275 A. D. 914; *800 Union Street Corp.* v. *Bookben Realty Co.,* (Sup. Ct., Kings) Official Referee, N. Y. L. J., p. 1196, Aff'd 278 A. D. 708, Aff'd. 302 N. Y. 926. In the above case the tenant's advance was to be used by the landlord to reduce and extend the outstanding mortgage on the leased premises resulting in a particular benefit to the tenant whose lease was subject to the mortgage.

People v. *Horowitz,* 309 N. Y. 426, is concerned with the prosecution of the landlord for grand larceny of a deposit in connection with a concession agreement. Indictment was dismissed because at that time Section 233 of the Real

Property Law was inapplicable to a concession agreement. Since that time the law has been amended and a different holding might now obtain.

Prudential Westchester Corp. v. *Tomasino,* 5 A. D. 2d 489 Aff'd 6 N. Y. 2d 824, is not in point because the Court found that the agreement between the parties and the payment made bore none of the distinguishing characteristics which would render Section 233 of the Real Property Law applicable. The Court held:

> "There was no proof to show that it (payment advanced by tenant) was either a deposit as security for the performance of the contract, or that it was an advance to be applied to payments on the contract when due (cf *Mallory Associates* v. *Barving Realty Co.,* 300 N. Y. 297; *Planetary Recreations* v. *Kerns, Inc.,* 184 Misc. 340)."

Land v. Gladol Realty Corp.. 18 Misc. 2d 103 (Sup. Ct. Kings) is a case in which the lease specifically authorized the utilization of the funds by the landlord towards the payment of the purchase price of the premises leased, and when the funds were so applied they were no longer subject to any trust relationship, a situation somewhat similar to the *800 Union Street Corp.* case, supra. However, the advances by the tenant were not made to the landlord but were made directly to the seller of the real property for which the landlord received credit.

No other cases have been cited by the Fair Corporation except *Mallory Associates, Inc.* v. *Barving Realty Co.,* Supra, a case in which the complaint stated that the plaintiff (tenant) did pay over the said sum of security to defendant and in the lease defendant (landlord) acknowl-

edged receipt. The Court of Appeals said in a majority opinion:

> "Defendants further assert that the statute is inapplicable because no moneys were deposited or advanced by plaintiff since the so-called security deposit was really a loan by plaintiff to defendants to enable them to purchase the property from plaintiff. It is a sufficient answer to this contention that the facts upon which it is based do not appear in the complaint and that is the only document with which we are here concerned. As noted, the complaint clearly states that plaintiff 'did pay over the said sum of security to defendant' and in the lease, defendant acknowledged receipt. Furthermore, even though defendants may have had the right to use said moneys toward the purchase price of the leased premises, section 233, by its terms, requires that the funds be held in trust 'until repaid *or so applied*' ". (Emphasis in original)

A strong dissent by Judge Fuld questioned the majority ruling but it appears even from his comments that the tenant's funds were commingled by the landlord with its funds. In the *Land* case, supra, which followed the *Mallory* case, the funds advanced to the landlord were not commingled. The Fair Corporation quotes from the *Land* case as follows:

> "In any event under section 233 of the Real Property Law, a deposit of security is a trust fund 'unless otherwise provided in the lease' (*People* v. *Horowitz,* 309 N. Y. 426, 428). The lease specifically authorized the utilization of the funds by the landlord towards payment of the purchase price of the prem-

ises and when the funds were 'so applied' the funds were no longer subject to any trust relationship (See *Mallory Associates, Inc.* v. *Barving Realty Co.*, 300 N. Y. 297)."

There was no authorization in Amphitheatre's lease for the Fair to use the security deposit for a specific purpose or for the peculiar or particular benefit of the tenant, nor is there any provision in the lease for the security to constitute a loan to the landlord.

The Fair's contention that a loan was accomplished cannot be sustained because such alleged loan would be a violation of the non-waiver provision of the stateu which prevents the creation of a debtor-creditor relationship by the deposit of tenant's security under the lease. Also for the same reason the Fair Corporation Notes issued in the name of Amphitheatre are not the security, but are merely further evidence of the amount of Amphitheatre's deposit under Article Forty-first of the lease.

A landlord who has commingled a rent deposit may not set-off claims for rent or other damages accruing under the lease of the tenant who seeks to recover the deposit. *Fore Imp. Corp.* v. *Selig*, 278 F. 2d 143, 145, aff'g *Matter of Tru-Seal Aluminum Prods. Corp.*, 2d cir. (1960) 170 F. Supp. 902; *Sommers* v. *Timely Toys, Inc.*, 110 F. Supp. 844, 847, (aff'd 2d Cir. (1954)), 209 F. 2d 342, 343; *In re De Gregorio*, (S. D. N. Y. 1963) 219 F. Supp. 783; *Bogart Packing Co.* v. *John-Jordan Inc.*, (S. Ct. 1950) 102 N. Y. S. 2d 133.

The landlord, New York World's Fair 1964-1965 Corporation has converted the security deposit of Amphitheatre, Incorporated in violation of the provisions of Section 7-103 of the New York Obligations Law, formerly Sec-

tion 233 of the New York Real Property Law and by reason of such conversion it may not set-off the funds represented by the security deposit against any claim for rent or damages accruing under its lease with Amphitheatre but must pay to the Trustee the amount of said security deposit, together with accrued interest free of any claim thereto of the Fair Corporation. For a pertinent New York State case see *Matter of Perfection Technical Services Press, Inc.*, 22 A. D. 2d 352, 256 N. Y. S. 2d 166 (2nd Dept. 1965) aff'd 18 N. Y. 2d 644 (1966).

These moneys are now on deposit pursuant to order of this Court dated May 6, 1966 and take the place of the Fair Corporation's 6% Notes which were issued to the tenant, Amphitheatre; the trustee having waived any interest in said Notes when the moneys were deposited pursuant to said order of May 6, 1966. But such deposit does not constitute a restitution by the landlord of the security deposit.

It is impossible to ascertain the intentions of the parties from the provisions of the lease, the subscription and the subscription agreement, insofar as they relate to security because their provisions are in conflict, they are not clear and unambiguous. The testimony of the parties in addition to these documents was needed to ascertain their true intent.

For all of the foregoing reasons I find that the Trustee has sustained his 5th, 6th and 7th counterclaims and is entitled to and shall be paid the moneys now on deposit pursuant to the order of May 6, 1966, with accrued interest, within twenty days after an order is entered in accordance with this decision.

Settle order on five days notice.

Dated at Jamaica, New York
September 5, 1967

/s/ SHERMAN D. WARNER
Referee in Bankruptcy

Decision of United States Court of Appeals For the Second Circuit

MOORE, *Circuit Judge*:

The Trustee in Bankruptcy of Amphitheatre, Incorporated (Amphitheatre), appeals from an order of the District Court for the Eastern District of New York, reversing the Referee's decision to uphold a counterclaim by the Trustee for return of $250,000 in security against the New York World's Fair Corporation (the Fair). The Fair sought to recover possession of its building and damages. The District Court remanded the case to the Referee to determine the amount the Fair is entitled to by resort to the security, and the Trustee appeals.

An agreement between Amphitheatre and the Fair resulted from extensive negotiations between the parties in February and March, 1961, for the lease of the 1939-1940 World's Fair New York State Amphitheatre and Exhibition Building in order for Amphitheatre to present commercial entertainment during the 1964-1965 World's Fair, then in preparation. The formal contract was signed on May 5, 1961. The term was to run from January 1, 1962, through the Fair's closing date in 1965.

Pursuant to a clause in the lease contract, Amphitheatre subsequently signed a subscription agreement for Fair Corporation Notes on June 21, 1961, totalling $250,000. Payment was made by two checks dated July 24, 1961, and August 18, 1961. These Notes were retained by the Fair as security according to the terms of the lease agreement, but were to be returned to Amphitheatre at the expiration of the lease. The Notes themselves were not due until nine months later.

The Trustee contends that the clause in the lease contract providing for the purchase and retention of the Fair Notes violates Section 233 of the New York Real Property Law[1] (now General Obligations Law §7-103). The Referee, after a hearing, found that it did violate that section and held that the Fair had converted the $250,000 received from Amphitheatre in exchange for the Fair's promissory Notes, entitling the Trustee to the funds without any offset.

The District Court reversed the Referee's determination on the ground that the transaction was a legitimate loan arrangement between the parties and not within the purview of the statute. We affirm that decision for the reasons set out below.

The pertinent clause of the lease is Paragraph Forty-first, which provides:

> Within sixty days after the execution of this lease . . . [Amphitheatre] shall deposit with the Fair . . . $250,000 principal amount of Fair Corporation's 6% Promissory Notes, purchased from the Fair . . .

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[1] New York Real Property Law §233

> Whenever money shall be deposited . . . on a contract . . . for the use or rental of real property as security for performance of the contract . . . such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit . . . and shall be held in trust by the person with whom such deposit . . . shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same, . . . Any provision of such contract . . . whereby a person who so deposits . . . money waives any provision of this section is absolutely void.

> as security for the full performance of this lease. . . . After the end of the Term and upon condition that [Amphitheatre] shall then be nowise in default . . . and shall have restored the Premises as required herein, and upon written request therefor by [Amphitheatre], the Fair . . . will return the security to [Amphitheatre], less any breach or default by [Amphitheatre] under this lease.

This provision evolved, as disclosed in the hearings before the Referee, from the Fair's initial demand that Amphitheatre furnish a $750,000 surety-company bond. This being too costly, Amphitheatre countered with an offer that one of its promoters would give his personal guarantee for the proper performance of the lease.

At this same time, the Fair was diligently attempting to meet the $25,000,000 subscription requirement needed to launch the $40,000,000 Note issue and essential for the creation of the Fair. As an alternative to either a surety-company bond or a personal guarantee, the parties agreed that Amphitheatre would purchase $250,000 worth of the Fair's forthcoming issue. These Notes would then be deposited with the Fair to serve as security for the lease.

It is apparent that Amphitheatre would not have bought Fair Notes as an isolated investment and its undertaking to do so and to put them up as security under the lease was a part and, as the District Court emphasized, a substantial part, of the price paid for the lease. It is also equally clear, as noted, that the Fair was anxious to accumulate subscriptions amounting to $25,000,000 and Amphitheatre's purchase of 1% was of material assistance in reaching that goal. Furthermore, getting those with a

primary interest in the Fair, such as lessees and exhibitors, to show sufficient confidence in it by purchasing Fair Notes was a good inducement for others to invest.

Paragraph Forty-first, therefore, correctly represents the agreement to which the negotiations had led. It cannot be said to be an attempt to evade the statute, nor is it a sham. In short, the Fair, seeking to issue the Notes, needed capital commitments to meet the launching requirements. Amphitheatre, desiring to produce entertainment during the Fair, found that by subscribing to Fair Notes, it could lease the Exhibition Building for that purpose.

The Trustee, however, asserts that the deposit of Notes was a deposit of money as security within the meaning of Section 233. While the deposit of the Notes was made as security for the performance of the lease, the nature of the transaction does not thereby become transformed into one for the deposit of money as security. The deposit of Fair Notes is not like cash that can be commingled with the Fair's other assets. Moreover, as is apparent from the Subscription Agreement, the money paid for the Notes was explicitly for, and limited to, pre-opening and construction expenses. That their purchase was a loan and not a deposit of money is additionally indicated by the fact that the Notes were not payable until nine months after the lease had expired and, although the Fair retained the Notes, interest was paid directly to Amphitheatre. The Notes and their deposit were an alternative to posting $750,000 in security, demanded in the early stages of negotiation. While this Court is not bound by labels or forms which the parties affix to their transaction, the Notes bore none of the characteristics present in the ordinary lease security situation regulated by Section 233.

The conclusion that Section 233 of the Real Property Law does not "bar, nor undertake to bring within its operative reach, other relationships," such as debtor-creditor arrangements between a landlord and his tenant is amply supported by New York cases.

In *800 Union Street Corp.* v. *Bookben Realty Co.*, 302 N. Y. 926 (1951), a provision in a lease authorizing a landlord to use the security money to pay down the mortgage on the leased premises was deemed not to be within the purview of Section 233 even though there was no provision for repayment. The Court, however, implied a duty to repay the loan into a statutory segregated trust within a reasonable time which was to be held as security for the conclusion of the tenant's proper performance of the lease obligations.

Similarly in *Barrow Associates* v. *South Broad Realty Corp.*, 275 A. D. 914, 90 N. Y. S. 2d 499 (1949), and in *Land* v. *Gladol*, 18 Misc. 2d 103, 187 N. Y. S. 2d 216 (Sup. Ct. 1959), money paid to the landlord, authorized by the lease to be employed to acquire title in the premises, was held to be outside the sweep of Section 233.

The most recent case, *Ja-Mo Associates, Inc.* v. *56 Fulton Street Garage Corp.*, 30 A. D. 2d 287, 291 N. Y. S. 2d 62 (1968), went further. Money was loaned to the landlord to pay off various debts and obligations in order to enable it to acquire title to the premises and to be in a position to enter into the proposed lease. The loan was secured by a mortgage which was then assigned to the landlord pursuant to a rider to the lease " . . . as security for the performance of this lease." The Court held Section 7-103 of the General Obligations Law inapplicable to the transaction because the unambiguous terms of the written in-

struments made it absolutely clear that the loan was actually part of the consideration for the lease and that the sum was not deposited as security.

The above cases indicate that bona fide loan arrangements between landlords and tenants, at least which relate to the leased premises, do not violate Section 233 when the money is used to acquire title to or benefit the leased premises. The money paid by Amphitheatre for the Notes was to be used to cover part of the expense of rehabilitating the Amphitheatre premises, as well as to erect the Fair. The Note issue was, therefore, indispensable to Amphitheatre's entertainment project and crucial to the opening of the Fair. There could never have been any intention that the Fair would hold the money paid for the Notes as security. Section 233 is thus inapplicable.

The order of the District Court is affirmed.

Federal Rules of Civil Procedure

Rule 52.

FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

General Order in Bankruptcy 47, 11 U. S. C. A. following Section 53

47.—Reports of Referees and Special Masters

Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall

accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

New York Real Property Law §233

(This section repealed and substance transferred to General Obligations Law §7-103, effective Sept. 27, 1964.)

§233. Money Deposited or Advanced For Use or Rental of Real Property—

Whenever money shall be deposited or advanced on a contract or license agreement for the use or rental of real property as security for performance of the contract or agreement or to be applied to payments upon such contract or agreement when due, such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the sale, but may be disposed of as provided in section thirteen hundred and two-a of the penal law. Any provision of such a contract or agreement whereby a person who so deposits or advances money waives any provision of this section is absolutely void.